# Supreme Court of the United States

OCTOBER TERM—1947

No. 79

THE UNITED STATES OF AMERICA,
*Appellant,*

*vs.*

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*

No. 81

PARAMOUNT PICTURES, INC. and PARAMOUNT FILM DISTRIBUTING CORPORATION,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA,

**On Direct Appeal from the District Court of the United States for the Southern District of New York**

## BRIEF FOR PARAMOUNT PICTURES, INC. AND PARAMOUNT FILM DISTRIBUTING CORPORATION

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### Opinions Below

The opinion of the District Court (R. 3504) is reported in 66 F. Supp. 323 and the Findings of Fact, Conclusions of Law and Decree and a supplemental opinion (R. 3659-3702) are reported in 70 F. Supp. 53.

### Jurisdiction and Statutes Involved

This suit in equity was commenced by the United States on July 20, 1938, pursuant to Section 4 of the Sherman Act,

for injunctions and other relief against agreements and acts alleged to violate Sections 1 and 2 of said Act.*

Final decree was entered December 31, 1946 (R. 3694). Petitions for appeal were filed by and allowed to all parties (R. 3725, 3737, 3751, 3762, 3767, 3804).

Jurisdiction is conferred by Section 2 of the Expediting Act (15 U. S. C. 29; 32 Stat. 823) and Section 238 of the Judicial Code (28 U. S. C. 345).

Probable jurisdiction was noted on June 23, 1947 (R. 3840).

## Proceedings in the Court Below

Suit was commenced by the filing of a petition on July 20, 1938. Answers were filed and various preliminary proceedings were had and the case first went to trial in June, 1940 before a single District Judge. At the conclusion of the opening statements, the trial was adjourned for the purpose of enabling the parties to negotiate a consent decree. These negotiations continued without substantial interruption until November, 1940 with four representatives of the Department of Justice participating. A proposed decree was formulated and presented to the District Judge who ordered a public hearing upon notice to all interested persons representing every phase of the industry. Such a hearing was held in November, 1940 and following it, an amended and supplemental complaint was filed (R. 3137), and the defendants filed their answers denying all its material allegations (R. 3201-3372). On November 20, 1940, a Consent Decree was entered to which the Government

*15 U. S. C. 1 and 2; Act of July 2, 1890, Ch. 647; 26 Stat. 209, printed in Appendix A hereto together with the pertinent provisions of the Copyright Act.

and five of the eight groups of defendants were parties* (R. 3373). The trial was adjourned as to the three non-consenting groups of defendants, Columbia, Universal and United Artists.

On August 7, 1944 the Government filed a motion for a modification of the Consent Decree (R. 3414) and on February 5, 1945, it filed a motion for a temporary injunction against continuance of certain trade practices (R. 3420). It then moved to have the case set for trial (R. 3448-9). While the motion for a temporary injunction, which was never decided, was *sub judice*, it filed an expediting certificate asking for the designation of a special court of three judges to hear and determine the case (R. 3502). Thereafter such a court was convened composed of Circuit Judge Augustus N. Hand and District Judges Henry W. Goddard and John Bright. Trial was commenced on October 8, 1945 and was concluded November 20, 1945. The printed minutes of the trial consume some 2,500 pages, and in addition, the record consists of over 450 exhibits on behalf of the Government, and approximately 140 exhibits on behalf of the defendants.**

The Government's case was entirely documentary, no witnesses being produced except two in rebuttal for the purpose of identifying compilations which they had made from exhibits. The defendants, on the other hand, produced in the aggregate 23 witnesses, among whom were their high-ranking executives expert in the production, distribution, and exhibition branches. With the Government's consent that they should be equivalent to oral testimony, the defend-

*Paramount, Loew's, RKO, Warner and Twentieth Century-Fox.

**The exhibits were so voluminous that, by stipulation of counsel, printing of them was omitted (R. 3825-29).

ants supplemented the oral testimony with numerous affidavits of executives and other persons with personal knowledge of the facts (R. 1044, 1227, 1230, 1246, 1552, 1794, 1824, 1838, 1844, 1850, 1873, 1891, 1923, 1924, 1927, 1928, 1937, 1966-2146, 2147, 2149, 2153, 2486; Exs. P 24, 24A, 25, 25A).

The trial court rendered its opinion on June 11, 1946 (R. 3504; 66 F. Supp. 323). Thereafter proposed findings of fact, conclusions of law and proposed decrees were submitted by the Government and by the defendants and a hearing was held with respect to the proposals. The minutes of this hearing are in the printed record (R. 2873-3090). The court entered its final decree and judgment on December 31, 1946 (R. 3694) on which day it also entered its findings of fact and conclusions of law (R. 3659) and rendered a supplemental opinion (R. 3702; 70 F. Supp. 53). Motions to amend the decree were made by defendants which the court denied, except that it did amend paragraphs III (2) and III (4) so as to postpone the effective dates of the prohibitions therein contained (R. 3719-20). On April 7, 1947, an order was signed by Mr. Justice Reed staying the operation of certain sections of the decree until further order of this Court.

## STATEMENT

### 1. The Defendants

The defendants below consist of eight of the principal companies in the motion picture industry and some of their subsidiaries or affiliated companies. Five of them, namely, Paramount, Loew's, RKO, Warner and Twentieth Century-Fox, called by the Government and the court below "the major defendants", are each engaged in all three

branches of the industry,—production, distribution and exhibition. They are also sometimes referred to as the "integrated" defendants, or the "producer-exhibitor" or "exhibitor"-defendants.* The so-called "minor defendants" Columbia and Universal, are engaged in production and distribution (Findings 44-52, R. 3667-9), and the other "minor defendant", United Artists, is a distributor only and distributes pictures produced by producers who are wholly independent of any defendant in the case (Finding 53, R. 3669).

## 2. The Issues

### A. The Charges and Prayer for Relief

The defendants were charged in the amended complaint (R. 3137) with combining and conspiring to monopolize and unreasonably restrain trade in the production, distribution and exhibition of motion pictures in violation of Sections 1 and 2 of the Sherman Act, in various ways alleged.

The amended complaint demanded that each of the contracts, combinations and conspiracies, and each of the al-

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*Paramount Pictures Inc. is a producer and distributor and owns stock interests ranging from 12½% to 100% in companies which directly or through subsidiaries own or lease and operate theatres (R. 824). Operation of the theatres is in the hands of employees of the operating companies, who generally own stock in the operating company or who, in cases where the operating company is wholly owned by Paramount, have management contracts giving them control over operations (R. 824-5, 827, 890-3). The operating companies conduct their unrelated businesses, such as, for example the licensing of pictures from all distributors, independently of each other and of Paramount (R. 824-5, 828-9, 966, 996, 1033-1034, Exs. P24 and P24A). Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is engaged solely in the distribution of films in certain states (R. 665; Ex. 85).

leged attempts to monopolize, be declared illegal, and that the defendants each be enjoined from continuing them; that the integration of the production and exhibition branches of the industry by the producer-exhibitor defendants be declared unlawful as an instrumentality to monopolize and restrain trade; that the five "major" defendants be ordered to divest themselves of all interest in theatres and theatres holdings, *or* of all interest in production and distribution facilities, and be permanently enjoined from acquiring any interest in the branch of the industry thus divested; that the exhibitor-defendants be ordered to divest themselves of all interest in any particular theatres which the court should find had been used unreasonably to restrain or to monopolize trade in motion pictures; and finally, that the court establish a nationwide system of impartial arbitration tribunals in order to secure adequate enforcement of whatever general and nationwide prohibitions the decree might contain (R. 3199-3200).

### B. The Consent Decree

The Consent Decree entered November 20, 1940 (R. 3373), effected several radical changes in the pre-existing methods of licensing motion pictures. It abolished certain trade practices of which the Government had complained, such as so-called "blind selling" (licensing before the picture was produced or the licensee had an opportunity to view it), conditioning of a license for feature pictures* on the licensing of short subjects or newsreels or other features,

*A feature now is defined as any motion picture in excess of 4000 feet in length (Finding 1, R. 3660). Pictures of less length are short subjects or "shorts".

and licensing in blocks of more than five features, and contained a provision designed to protect independent exhibitors* from the arbitrary refusal of a distributor to license pictures on some run.

The Consent Decree recognized that certain other trade practices had in their operation given rise to a number of complaints and criticisms on the part of some exhibitors. One of these practices was the one whereby the distributor, in licensing a feature picture, agrees not to exhibit it or permit it to be exhibited in another's theatre in the licensee's competitive area until after the expiration of a designated number of days following the completion of exhibition by the licensee. This practice is known as the granting of "clearance" (Finding 1, R. 3660). Exhibitors do not complain of the practice as such, in fact most of them demand it, but there were disputes as to its length and the area it covered in some instances.

The Consent Decree recognized that clearance was essential in the distribution and exhibition of motion pictures (R. 3380); that the factors necessary to be considered in determining what was and what was not a reasonable clearance period or area were complicated and not capable of precise determination, and that they rested primarily on the exercise of sound business judgment. The Consent Decree, therefore, in accordance with the prayer in the amended complaint (R. 3199-3200), established a nation-wide arbitration system designed to provide an inexpensive, speedy and fair remedy for an independent exhibitor who complained that the clearance granted to a competitor over

*An independent exhibitor is sometimes defined as one not a defendant or a subsidiary or affiliate of one (Finding 1, R. 3660). Cf. note to p. 27, *infra*.

his theatre unreasonably affected his business. The American Arbitration Association was appointed as administrator of the system and, to insure proper and complete impartiality and an opportunity to review the decision of the arbitrator, provision was made for the establishment of an Appeal Board appointed by the district court. Rules of procedure were made part of the Decree.

At the public hearing prior to the entry of the Consent Decree, Government counsel stated what the parties had endeavored to do in formulating it. He said:

> "The approach on the part of all—on the part of the defendants filing the consent and on the part of the government, was an endeavor to meet through the terms of the decree a solution of the alleged evils and the alleged abuses in the motion picture industry, without resorting to the very drastic remedy of divorcement. That was arrived at rather early in the sessions." (p. 504)
>
> "Now as to the terms of the decree, I might say by way of preface that the problems of the motion picture industry are not identical to the problems of all other industries. They are peculiar, peculiar to the industry and its nature, and during the five months of negotiations every problem relating to the distribution of pictures was examined by the conferees in all its ramifications." (p. 505)
>
> "But I can say this much: that an honest endeavor has been made by those participating in the conferences to work out a method of business through prohibitions and a system of arbitration which should work and which should relieve a great many if not all of the complaints that are made against the existing operations of the industry." (p. 506)

"And I might say in that connection that it has long been felt, both by exhibitors and by distributors, that there is no fairer way to handle and dispose of complaints concerning clearance than to have the clearance fixed by some impartial arbitrator, and that is precisely what is accomplished by Section VIII." (pp. 524-525)

"I don't believe that anybody who has participated in the five months of worry and discussion and argument considers the decree a panacea or the dawn of utopia in the movie industry. At the same time I think it fair to say that both the defendants and the government honestly believe that it is infinitely to be preferred to years of litigation with the possibility at the end of the chaos that might result from divorcement. It is the hope and the desire of all that it will bring to the industry a degree of peace and good feeling. Every human safeguard that we could think of has been thrown about the operation of the arbitration system to keep it free, efficient and impartial." (pp. 537-538)

The Consent Decree reserved the right to the Government to seek other relief, including dissolution and divestiture after the lapse of three years.

Under the Consent Decree, there had been, at the time of the trial, 416 arbitrations and 122 appeals to the Appeal Board (R. 1859-61). As the court noted in its supplemental opinion, these tribunals have functioned "with rare efficiency" (R. 3702).

### C. The Government's Contentions at the Trial

At the trial the Government contended that the primary issue was one of the relief to which it was entitled, contending that admissions and undisputed facts clearly in-

dicated violations of law requiring the relief requested. It argued that the evidence showed collective control by defendants of the domestic film market, and that ownership and control of theatres by an important distributor of films was, in itself, a continuing unreasonable restraint upon competition in distribution and exhibition. It urged that the evidence showed that the required relief was (1) divestiture from the five major defendants of all their interests in theatres, and a prohibition against further acquisitions of theatre interests by them, and (2) injunctive relief against all the distributor defendants restraining them from various license practices.

The charge was made that the five integrated companies —those engaged in production, distribution and exhibition— collectively exercised arbitrary control over the industry through agreements between themselves and the three minor defendants, and that each of the five integrated units was, in itself, an illegal combination (R. 5).

It was asserted (R. 6) that operations under the Consent Decree left these defendants' collective control over the three phases of the business substantially untouched so that, after failure of new and prolonged negotiations for a new Consent Decree, the issue of divorcement (of exhibition from distribution and production) was again before the court. Accordingly, the Government sought modification of that Decree in its entirety, including the complete elimination of the arbitration system which had been established pursuant to the prayer of the amended complaint.

There was no proof of any monopolistic purpose, agreement or conspiracy in the acquisition of any theatres or of any interest in any company operating theatres by any of the defendants, or in the acquisition of the production or

distribution facilities by those who began as exhibitors and then acquired production and distribution facilities—on the contrary, the proof was of competition in acquisitions (R. 954, 1555-6, 1826; Finding 42, R. 3667). Nor was there any proof or finding that any unlawful monopoly or monopolies resulted from integration, whether defendants' theatre holdings be treated individually or collectively. The findings are directly to the contrary.

### D. The Trial Court's Findings and Conclusions

The court below affirmatively found and concluded that there had been no monopolization by the defendants, either individually or collectively, of either production or distribution or exhibition. These findings and conclusions are amply supported. As to production, the record disclosed without contradiction substantial and unrestrained competition (R. 626-32, 639, 641, 652, 1263-5, 1407-8, 1527-9, 1532-3, 1544, 1547, 1551, 1795-1806), and Government counsel conceded this fact (R. 386-8, 1949, 1952-3).*

The trial court found that there had been no violation of the Sherman Act with respect to production (Findings 59, 60, R. 3670), and that the Government had formally abandoned its charges with respect thereto (R. 3509). It

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*In addition to the 7 defendant producers, there are numerous important so-called independent producers. Some of the best known are David Selznick, Samuel Goldwyn, Alfred Hitchcock, Preston Sturgis, Sam Wood, William Wellman, Allan Dwan, Frank Lloyd, Jean Renoir, Gregory Ratoff, International Pictures, Edward Small, Lester Cowan, Hunt Von Stromberg, Eddie Golden and Borgeaus Productions (R. 637-641, 652, 1407). There are many more independent producers than there were in 1940 before the Consent Decree (R. 640, 1551, 2733).

thereupon dismissed the complaint insofar as it charged violations of law with respect to production (Decree, Section I, R. 3695).

As to distribution, the trial court stated in its opinion (R. 3554; 66 F. Supp. 354) that there was general competition among all of the defendants, as well as between them and other distributors, for the exhibition of their various pictures, which the Government had conceded (R. 1062). It found that in excess of 600 features pictures are released for exhibition each year in the United States (Finding 106A, R. 3679).* Of these pictures, the defendants in the aggregate distributed in 1943-4 only 260 (Finding 99, R. 3677), or about 43 percent.** No one defendant distributed more than 49 features or 8 percent of the total (Findings 99, 106A, R. 3677, 3679). Of the pictures distributed by defendants, many were produced by independent producers and distributed under contract by one of the defendants. Thus, 19.8 percent of RKO's releases were independently produced (Finding 101, R. 3678). All of United Artists' releases were independently produced (R. 1407-9, Finding 54, R. 3669). Some of the features released by

*In addition to the eight distributors who were made defendants, there were at the time of trial at least three other nation-wide distributors (Monogram, PRC and Republic) and a number of sectional distributors known as State's Rights distributors (R. 544-6, 659-61). No evidence was introduced to show the number of features released by the State's Rights distributors or by others than the eleven national distributors, so that no over-all industry figures are available. Since the trial, at least two other national distributors with their own exchanges have entered the field, Eagle-Lion (J. Arthur Rank) and Selznick Releasing Corporation.

**RKO Exhibit 2 (R. 1611) indicates that there were 442 features distributed, so that even on this basis the defendants' aggregate releases would be only about 59%.

the other defendants were likewise independently produced (Paramount, R. 743-4; Loew's, Am. Compl. 36,* R. 3152; Warner's, R. 1825, Am. Compl. 51, R. 3156; Columbia, R. 1260-1, Ex. C-1; Universal, R. 1458-9; Twentieth Century-Fox, R. 1568). It was conceded, as the evidence established, that any producer making a good picture could be assured of adequate distribution (R. 1266, 1949).

The uncontradicted testimony was that the distributor defendants actively compete in distribution (R. 675-678, 701-2, 743-45, 1407-8, 1466-8, 1504, 1651-3, 1687-8, 1729). They license their films to exhibitors through their own respective film "exchanges" located in various parts of the country, and each distributor's exchange is maintained entirely independently of any other's (R. 543-5, 666-668, 1053-4, 1415, 1504, 1685). Familiar merchandising promotion schemes are used by each distributor in order to create interest in its product (R. 677-8). Regular meetings are held for the purpose of acquainting each distributor's salesmen with its product and of inspiring them to license as many films as possible. Such meetings are held by each distributor with its own staff and entirely independently of any other distributor (R. 674-676). "Sales" drives are also conducted by each distributor independently (R. 677, 1061, 1467-8) and there has been no joint advertising (R. 679), nor have distributors exchanged information as to the terms of the licenses granted by them (R. 742). In short, competition is "very keen", each distributor doing his utmost to fill as much as possible of the playing time and the preferred playing time of each exhibitor (R. 701-702, 904, 969, 970, 977-978, 998). Keen competition has also always

*Reference is to the paragraphs of the Amended and Supplemental Complaint (R. 3137).

existed among distributors in their attempts to obtain the right to distribute the product of independent producers, i.e., producers who do not have distribution facilities of their own (R. 743-744, 1651, 1687-1688). Each of the national distributors which does not have theatre interests (i.e., Columbia, United Artists, Universal, Republic, Monogram and PRC) has developed in financial strength and has been able to improve the quality of its pictures during the period when the integrated defendants are alleged to have acquired and maintained a monopoly (R. 906-8, 910-11, 1255, 1257, 1457-8; Exs. 408 and 409)*.

Manifestly, therefore, the evidence points only to the conduct of separate businesses competitively and not collectively. New competitors have not been frozen out or hampered. The restraints found by the court below do not affect the essential qualities of this bitterly competitive business.

As to exhibition, the court found that the total theatre holdings of the five major defendants amounted to only 17.35 percent of the 18,076 theatres in the country (Finding 118, R. 3684). It concluded that, on the evidence, their holdings could not be aggregated for purposes of establishing a monopoly (R. 3553; 66 F. Supp. 354). Furthermore, it found that the theatre holdings of any one of the defend-

*In 1932 the Second Circuit Court of Appeals held that Paramount had no monopoly and no means of acquiring one. *Federal Trade Commission* v. *Paramount Famous-Lasky Corporation*, 57 F. (2d) 152 (C. C. A. 2, 1932). Since that time new competitors have appeared in the national distribution field and others have strengthened their positions. Paramount's income, while substantial, amounts to only about 16% of the aggregate income of the 8 defendant distributors (Ex. 425). It is an even smaller percentage of the income of all distributors in the field. It distributes about 31 features annually out of a national total of from 335 (Finding 99, R. 3677) to 600 (Finding 100 A, R. 3679).

ants alone, or, indeed, of all in the aggregate, did not and could not, constitute a monopoly (Finding 119, R. 3684). It likewise found that there was no proof that any of the defendants had been organized for the purpose of achieving a national monopoly (Finding 152, R. 3689-90) and no proof of any unlawful local monopolies (Finding 153, R. 3690). There was no community of officers or directors among the defendants and none owned any controlling stock or securities of another (Finding 57, R. 3670). Moreover, the percentage of features on the market which any of the five exhibitor defendants can play in its own theatres would be relatively small and would in no wise approximate a monopoly of exhibition (Finding 100, R. 3678). These findings are amply supported (Exs. RKO 11, L 2; R. 601-605, 609, 1554-1556, 1597-1599, 1838-1839, 1966 *et seq.*)

However, the trial court concluded that *all* defendants had unreasonably restrained trade in the businesses of distribution and exhibition, and had attempted to monopolize such trade, both before and after the Consent Decree, by acquiescing in the establishment of an admission price-fixing system by conspiring with each other to maintain theatre admission prices; and by conspiring with each other to maintain a nation-wide system of runs and clearances, which was substantially uniform in each local competitive area (Conclusions 7(a) and (b), R. 3692).

It likewise concluded that *the distributor-defendants* had similarly violated the Sherman Act by (1) agreeing individually with their respective licensees to fix minimum admission prices; (2) agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits; (3) agreeing individually with their licensees to

grant them unreasonable clearance over their competitors; (4) making master agreements and franchises;* (5) individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films (except in the case of United Artists); and (6) as to Paramount and RKO, making formula deals* (Conclusions 8(a) to (h), R. 3692-3).

The court also concluded that the five *exhibitor-defendants* had unreasonably restrained trade in the distribution and exhibition fields, both before and after the Consent Decree, by (1) jointly operating theatres with each other and with independents through operating agreements or profit-sharing leases (i.e. "pooling" operations); (2) jointly owning theatres with each other and with independents through stock interests in theatre buildings; (3) conspiring with each other and with the distributor defendants to fix substantially uniform minimum theatre admission prices, runs and clearances; and (4) conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission prices, runs, clearances and other license terms (Conclusion 9(a) to (d), R. 3693). It also concluded that certain formula deals, master agreements, and franchises had tended to restrain trade in violation of Section 1 of the Sherman Act (Conclusion 10, R. 3693), and that conditioning a license of one or more copyrighted features upon the license of one or more other features, violated the Sherman Act (Conclusion 11, R. 3694).

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*Defined in Finding 1 (R. 3660).

### 3. Distribution Practices

As the business of distribution and exhibition of motion pictures is largely *sui generis*, an understanding of its peculiar nature is essential background.

Films are not sold. The form and substance of the transaction which secures the reward to the owner of a feature picture is a limited license under copyright permitting the licensee to exhibit the picture (Finding 61, R. 3670), coupled with the bailment of a positive print of the picture to enable the licensee to project it upon his screen.

Since the early days of the industry, it has been the universal practice, dictated by necessities as well as experience as to the best and most profitable method of distribution, to license the exhibition of feature pictures, all of which are copyrighted (R. 529, 658, 1723), upon successive limited and often exclusive runs in each competitive area (R. 1894-5).* The first exhibition in a given area is called

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*When motion pictures are photographed, a negative is developed from which a number of positive prints are made for distribution to theatres obtaining licenses to exhibit them (R. 1895). The cost of a print varies with its length. For example, a black and white print costs from about $150 to $300, while those in technicolor cost from $600 to $850 (R. 1895-6; Finding 74, R. 3673). Many licenses for features are for license fees which are considerably less than the cost of the print bailed to the exhibitor. In fact, the majority of exhibitors pay license fees amounting to but a small fraction of the cost of a single black and white print (R. 671, 1074-5, 1898-9). There are approximately 18,076 motion picture theatres in the United States (Ex. L. 2; Finding 118, R. 3684). Paramount features, for example, are customarily licensed for exhibition in from 8,000 to 14,500 theatres annually (R. 668; Finding 130, R. 3686). Each feature which it produces and distributes costs from $200,000 to $3,000,000 or more to produce (R. 1895), and the number of positive prints which it makes of each feature varies from about 150 to 325, depending

the first run, the second exhibition is called the second run, and so on. All features are so licensed, and each theatre obtaining a license on any run, the last as well as the first, exhibits the identical picture projected from such print as may be available.

Included in many licenses is an agreement, known as a "clearance" agreement, that a certain stated number of days shall elapse between the conclusion of the particular run licensed and the beginning of the next succeeding run of the picture licensed in the particular competitive area (R. 1894-5).

License fees are either an agreed and definite amount, sometimes called a "flat rental" (R. 694, 1722-3, 1905), or an agreed percentage of the gross box office receipts of the theatre during the exhibition of the particular feature licensed (R. 694, 815, 1082, 1905).

It has likewise been a common and ancient practice to incorporate in the license a provision that the exhibitor shall continue to charge not less than a specified minimum price for admission to his theatre during the exhibition of the particular feature or features licensed. These minimum prices which are thus specified in the license are the admission prices adopted by each exhibitor and customarily being charged currently by him, and the provision is merely to prevent unusual changes which would, among

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upon the popular appeal of the particular feature (R. 670, 1896). Ordinarily each positive print must serve from 45 to 60 theatres (R. 672, 1898).

This means that staggered exhibitions are essential (Finding 75, R. 3673) and that it is economically impossible for Paramount or any other distributor to make enough prints to enable it to license all customer theatres to show a feature simultaneously (R. 1898-9).

other things, seriously affect license fee calculations (R. 433, 439-40, 583, 717-8, 916, 1083-5, 1382-3).

The foregoing practices date from the early days of the industry and were adopted individually by those engaged in the industry before there was any integration of distribution and exhibition (R. 611-12, 717, 916-917, 1080-1, 1894-5, 1904; Exs. P 5 and P 6). They are not confined to the defendants but are used by all distributors (R. 544-5, 707, 918, 1506), and affiliated and unaffiliated theatres alike are licensed pictures on runs (R. 704-5) with clearance (R. 977, 1004-6, 1086, 1270, 1506), on flat rental or percentage terms (R. 697, 814-5), and at specified minimum admission prices (R. 1723). Thus these practices are entirely unrelated to ownership of theatres by a distributor. Before the court below condemned some of them, they were universally accepted major premises of the trade as essential in it, regardless of any question of theatre ownership.

The trial court found, upon uncontradicted evidence, that clearance which was reasonable as to time and area is essential in the distribution and exhibition of motion pictures and that it was of proved utility in the industry and was necessary for the reasonable conduct of business (Finding 78, R. 3674). It found that licensing for successive exhibition dates, i.e. runs, or a license providing for clearance, benefited the public by permitting it to see a picture later in other theatres at lower prices (Finding 76, R. 3673), and it found that a proper clearance covenant afforded a fair protection to the interests of the licensor in the license fees to be derived from exhibition without unreasonable interference with the interests of the public (Finding 77, R. 3673). These findings are amply sup-

ported (R. 707-710; Consent Decree Sec. VIII, R. 3379-80).

While the court correctly appraised the imperative necessity of these practices of licensing on successive runs with clearance, it erroneously read the evidence of similarity of runs and clearances granted, and the provisions for minimum admission prices inserted in a given exhibitor's licenses by the distributors dealing with such exhibitor, and the relative stability of such provisions, as reflecting agreement and conspiracy among the defendants. The undisputed evidence amply demonstrated that the similarities in these respects were instead the natural result of independent competitive forces. We have assigned and specified this conclusion of the court as error, and maintain that it was wrong, but we shall not argue the error assigned at length, merely noting in the footnote some of the factors which emphasize the error, and relying on the arguments in the briefs of other defendants.*

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*The court inferred concert and conspiracy merely from the fact that certain provisions in the licenses granted by each distributor to the same theatre, whether affiliateed or not, provided for similar runs and clearances and provided for similar minimum admission prices. The Government had called no witnesses on its direct case to show that the similarities arose out of unlawful agreement or conspiracy between any of the defendants. The defendants, on the other hand, called their top executives who explained that such similarities were in fact not the result of agreement or conspiracy (R. 422, 425, 710-11, 1708, 1715), but came about by reason of the fact that each exhibitor who dealt with two or more distributors desired the same run and clearance from each (R. 717, 1708-9), and that the similarity of minimum admission price provisions in the licenses resulted from the fact that the prices were the admission prices that the exhibitor himself fixed and was charging currently (R. 723-4; Finding 63, R. 3670), and that each exhibitor chose not

The court also concluded that various other practices in distribution were illegal and should be enjoined. As to these, we argue in Point II of this brief that the court erred in its mandatory directions requiring competitive bidding in future licenses (Decree II(8)).

**4. Summary statement as to reasons for and history of integration of exhibition and distribution by the exhibitor-defendants (including Paramount).**

There were 18,076 motion picture theatres in this country in 1945, an increase of 4,790 over 1935 (Findings 118, 145, R. 3684, 3688) and of 12,000 from the period of 1908-1919 (Pet., 28).*

Originally theatres where motion pictures were shown were mostly remodeled stores with only a few hundred seats (R. 596), but with the advent of the feature picture, vaude-

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to vary those admission prices as between pictures of the various distributors as such a course would have injured his good will with his patrons (R. 722-3, 1382-3). The testimony was that competitive forces compelled similar provisions as to runs, clearance and minimum admission prices and that such similarity as appeared was inevitable (R. 711, 717, 725). The defendants' witnesses were experts in their field (R. 411, 665-6, 1684). If what they testified to was erroneous or untrue in any respect, there were many thousands of exhibitors available as witnesses to the Government to rebut the testimony, yet none were called. The testimony, not being irrelevant or contradicted or opposed to the probabilities or incredible, could not properly be disregarded. *Kelly* v. *Jackson*, 31 U. S. 622, 632 (1832); *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, 299 (1930); *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 340-1 (1932); *Chesapeake and O. R. Co.* v. *Martin*, 283 U. S. 209, 214 (1930).

*Reference is to the paragraphs of the original complaint, called Petition.

ville theatres showed pictures and new theatres were built for pictures exclusively (R. 600). Circuits of theatres under the same management grew up early in the business as existing circuits of vaudeville houses turned to pictures (R. 601). Motion picture theatre operation became a specialized business requiring skill in management, showmanship and the art of attracting patrons and establishing and maintaining a clientele (R. 828). Motion picture theatre average weekly attendance increased from 40,000,000 in 1922 (Pet. 54) to 95,000,000 in 1945 (R. 1611; Ex. RKO 2).

Prior to about 1917, with a few minor exceptions, there was no affiliation between production and distribution of motion pictures, on the one hand, and exhibition of them on the other (Pet. 40, 56). Producers and distributors, such as Paramount's predecessor (Pet. 43; Am. Compl. 18-26, R. 3146-9) owned no theatres, while certain exhibitor organizations, such as Loew's (Pet. 48; Am. Compl. 27-37, R. 3149-3152), and the theatre owning predecessors of RKO, owned no production or distribution facilities (Am. Compl. 56-66, R. 3158-61).

The evidence in this case, much of which is summarized in the findings below, established that integration in this industry began in about 1917. At that time a powerful group of exhibitors, ultimately comprising some 3,500 members representing as many or more theatres, formed First National Exhibitors' Circuit (R. 601-4).* This corporation was initially organized to function as a,

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*The Petition alleges that there were only about 6000 theatres in the period from 1908-1919 (Pet. 28). If this figure is accepted as correct, First National represented about 58% of the then existing outlets for films.

film buying combine to exert its buying power toward getting lower license fees (R. 601). It evolved into a film producing company, first, by financing the production of pictures by others for exhibition in the theatres of its members and in those of their licensees, and finally, by producing its own motion pictures (R. 601-2; Finding 4, R. 3661).

First National soon began to negotiate for and obtain the services of well known stars and directors in the employ of other producers, including Famous Players Company, the predecessor of Paramount (R. 601-2; Finding 6, R. 3661-2). Members of First National refused to exhibit Paramount films (R. 602-3, 644-5) and the growth of First National gradually cut down the number of Paramount pictures exhibited in theatres belonging to the combine (R. 605).

By 1919 Paramount's predecessor, then the leading company in the industry (R. 904-5; Pet. 15; Am. Compl. 97, R. 3167), faced a situation where the owners of the best theatres in the leading cities of the United States, many of whom had been its customers in the past, had combined together for cooperative buying of pictures, and had grown into a strong organization which was distributing its own pictures and threatening to supply its members and licensees with enough pictures to permit them to operate without using those of Paramount or any outside producers (Am. Compl. 98-9, R. 3167; Finding 7, R. 3662). Paramount's markets were thus being seriously threatened and curtailed (R. 601-606, 642-5; Pet. 38).

In these circumstances Paramount determined, as a competitive measure, to acquire interests in theatres of its own to which its pictures could be licensed and where they

could be shown in competition with those of the First National group as well as of others (R. 605-7). Between 1917 and 1919 it acquired interests in two theatres in New York City to insure the display of its pictures in that city as a medium of exploitation for the United States (R. 602-3), and it formed Southern Enterprises, Inc., which acquired various theatre interests in the south (R. 606, 643-645; Ex. 85). At about the same time Paramount acquired a 50% stock interest in a chain of theatres in New England (R. 606-7; Finding 8, R. 3662; Ex. 85).* A subsidiary was formed in 1920 to acquire a theatre in St. Louis to provide an outlet for Paramount pictures which had been lost because of the activities of First National (R. 607; Ex. 85). Meanwhile, other producers were acquiring theatres in competition with Paramount (R. 607-8).

The entry of Paramount into the exhibition field by the acquisition of theatres or interests in companies operating them was thus caused by competition and not by conspiracy or an attempt to monopolize. It created rather than restrained competition (R. 607-9). Many of its later acquisitions were in competition with others (R. 937-40).

In about 1920 Loew's, which was then a company owning a chain of vaudeville and motion picture theatres (Ex. 48; R. 1839), acquired Metro, a producing company, and later in 1924 Metro merged into Metro-Goldwyn-Mayer, a subsidiary of Loew's (Ex. 48). This move was caused by competition (Pet. 48) and resulted in a stronger company to compete with Paramount's predecessor and other producers and exhibitors.

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*The remaining 50% of the stock was later acquired by Paramount (R. 606-7; Ex. 85).

A predecessor of Twentieth Century-Fox, namely Fox Film Corporation, likewise acquired theatre interests in competition with Paramount's predecessor (R. 937-8, 2041-2).

In about 1928 Warner, which was pioneering sound pictures, needed outlets which could be equipped with the necessary and expensive installation to permit their exhibition (R. 953-4, 1554-5). As a means to this end it acquired in 1928 an interest in a number of theatres in Pennsylvania and New Jersey through the acquisition of the stock in an existing circuit, the Stanley Company of America (R. 1555-6; Findings 24-30, R. 3665). Warner was the first company to introduce sound pictures, and its entry into the exhibition field was likewise a competitive measure to enable it to exploit its sound pictures in competition with producers and distributors of silent pictures.

The Warner pictures were made and its theatres were equipped with sound equipment made by Western Electric Company. (R. 1554). A competing type of equipment was being developed by Radio Corporation of America. That company organized RKO in 1928 for the purpose of obtaining an effective means of developing the use of its sound equipment in the motion picture production and exhibition fields (R. 1597; Finding 18, R. 3664). At the time of its organization RKO obtained production and distribution facilities by merger with a small company, in which it invested substantial sums to modernize its facilities (Finding 19, R. 3664). It likewise acquired interests in a number of companies operating circuits of vaudeville theatres, which it equipped for its type of sound pictures (Finding 21, R. 3664). The formation of RKO produced a new and substantial competitive factor in the field and increased compe-

tition in each of the three branches of the industry (Findings 22, 23, 121, R. 3664, 3684-5).

Thus, the integration by each of the defendants of production and distribution on the one hand, and exhibition on the other, was caused by competition and resulted in increased competition. Each of the defendant companies which integrated its business did so for competitive reasons and not for monopolistic purposes. Each had its own compelling reasons for integrating. Some did so by entering the exhibition field, and others did so by entering the production and distribution fields (R. 601-5, 609, 642-5, 1554-5, 1556-8, 1597; Pet. 47-8; Exs. 48, 109). All resulted in increased competition with ensuing public benefits of better pictures and better theatres.

The ways in which the defendant-exhibitors individually integrated their business of exhibition and distribution were different in each case, and no pattern is discernible. Sometimes new theatres were erected to compete with existing ones; sometimes existing theatres were acquired in fee or by lease but continued to compete in their respective areas. In other instances existing circuits or interests therein were acquired through the acquisition of all or part of the stock of an operating company or of a holding company which owned all or part of the stock of an operating company (R. 601-9, 642-645, 890, 905-908, 988, 2038-40, 2078-9; Ex. 85; R. 1838-9; Ex. 48; R. 1597-1599; Exs. 91, 98, 101, 107, 109; R. 1247-8, 1250-3; Ex. 45, R. 1553-8).

The genesis of integration set out above strongly supports the conclusion below that such integration was and is lawful, and emphasizes the undesirability of removing the integrated defendants from competition in exhibition which the Government demands.

## SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

### As to Exhibition and Distribution

Paramount assigns and will here urge error to so much of Section III of the decree (R. 3698) as enjoins it as an exhibitor

(1) from continuing to own or acquiring any interest in a theatre with an independent,* unless the defendant's interest be 5% or less, or 95% or more, Assignments 31-34, 45, 46, R. 3746-47, 3749-50; and

(2) from expanding its present theatre holdings in any manner except as permitted by Section III (5), Assignments 34-35, 45, 46, R. 3748-50.

Paramount likewise assigns, and will here urge, error to the failure and refusal of the court

(3) to decree that defendant Paramount Pictures Inc. might apply to the court for permission to retain any present partial interest in a theatre or group of theatres upon a showing to, and a finding by the court, that the retention thereof did not and would not unreasonably restrain competition, Assignment 39, R. 3749; and

(4) to decree that in any case where it is shown that a joint relationship between Paramount or a subsidiary thereof and another person resulted from the

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*An independent here is defined by the decree as "any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question." Decree III (5) R. 3699-3700. *Cf.* Note to page 7, supra.

sale, transfer or other disposition by Paramount or its subsidiary (or by the trustee in bankruptcy or other legal representative of either of them) of the partial interest to such other person, Paramount might apply to the court for permission to continue such relationship to the extent to which, and in the place in which, the parties were not in competition at the time of such sale, transfer or other disposition of such partial interest, Assignment 40, R. 3749; and

(5) to decree that defendant Paramount Pictures Inc. might expand its present theatre holdings for the purposes of acquiring interests in theatres in order to protect its investments or in order to enter a competitive field upon a showing, as to each new theatre, that such acquisition would not unduly restrain competition in the exhibition of feature motion pictures in the competitive area where such theatre was to be acquired, Assignment 36, R. 3748; and

(6) to grant the motion of these defendants to amend and modify Paragraph (6) of Section III of the decree so as to permit the acquisition of new theatres for the purpose of protecting investments or entering a competitive field upon a showing to the satisfaction of the court, and a finding by the court, that such acquisition would not unduly restrain competition in the exhibition of feature motion pictures, Assignment 37, R. 3748.

The two Paramount defendants also assign error to

(7) the findings that they or either of them were parties to or engaged in or acquiesced in any system

in violation of the Sherman Act, or that they or either of them conspired to violate the Sherman Act, and to so much of the conclusions and decree as are based upon such findings, Assignments 6-11, 13, 14, 16-19, 21, 22-24, 29, 30, 44-46, R. 3741-46, 3750.

These defendants also assign error to so much of Section II of the decree (R. 3695) as enjoins each of them as a distributor

(8) from granting any license in which minimum admission prices are fixed or agreed upon, Assignments 1-13,15, 45, 46, R. 3739-43, 3750;

(9) from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features, Assignments 25, 26, 28, 45, 46, R. 3745-46, 3750; and

(10) from licensing their features in any way except as prescribed by Section II (8) of the decree which, among other things, requires the novel procedure sometimes referred to as "competitive bidding", Assignments 27, 45, 46, R. 3745-46, 3750;

(11) and also to so much of the decree as places the burden of proving reasonableness of a clearance agreement upon the distributor, Assignments 20-24, 45, 46, R. 3744-45, 3750.

In this brief we shall argue assigned errors (1) to (6) above, having to do with the trial court's injunction against the continued ownership by Paramount of joint interests in theatres with independents, and the injunction

against future theatre acquisitions, together with the court's refusal to correct these errors when timely requests that it do so were made. We shall also argue in this brief that the court erred in enjoining the defendants from licensing their features in any other way except as prescribed by Section II (8) of the decree. (Assigned error (10), *supra*).

We shall rest our argument as to the other assignments upon the arguments made in the briefs of other defendants and thus will not attempt to cover in this brief our assigned errors relating to the finding of conspiracy, to the injunction against minimum admission prices, to the conditioning of a license for one feature upon the licensee's taking one or more other features, and as to that provision which places the burden of proof of reasonableness of clearance upon the distributor.

**As to Arbitration**

These defendants likewise assign error to Section V of the decree (R. 3700) in so far as it abolishes arbitration of disputes relating to runs and clearance substantially in the manner, and under a system such as that which was asked for in the amended complaint and which, with the Government's consent, was established and which functioned under the Consent Decree. (Assignments 41, 42, 45, 46, R. 3749-50). As to this error also, we shall avoid duplication and rely on the presentation of the matter in briefs of other defendants to which we respectfully refer.

## SUMMARY OF POINTS TO BE ARGUED AS APPELLANTS

I. The court erred in Section III of the decree in enjoining the exhibitor-defendants from continuing to own or acquiring theatre interests with independents, and in enjoining them from expanding their theatre interests.

A. The court was clearly right in denying the Government's demand for divestiture of the exhibitor-defendants' respective theatre interests.

B. The court erred in directing the termination of partial theatre interests held by defendants with independents, as defined by Section III(5) of the decree.

C. The court erred in enjoining the exhibitor-defendants from expanding their theatre interests as provided for in Section III(6) of the decree.

II. The court erred in directing that licenses may be granted only after "competitive bidding" and in enjoining defendants from licensing their pictures in any manner other than that prescribed in Section II(8) of the decree.

## ARGUMENT AS APPELLANTS

### POINT I.

**THE COURT ERRED IN SECTION III OF THE DECREE IN ENJOINING THE EXHIBITOR-DEFENDANTS FROM CONTINUING TO OWN OR ACQUIRING THEATRE INTERESTS WITH INDEPENDENTS, AND IN ENJOINING THEM FROM EXPANDING THEIR THEATRE INTERESTS.**

The Government charged the defendants with obtaining and maintaining a *collective* monopoly of exhibition and also charged that the ownership and control of theatres by a defendant-distributor *individually* was unlawful. The court below correctly concluded that neither basis for the Government's intransigent demand for divorcement had been made out. On this record such relief would have been a grotesque *non sequitur*. The findings below, fully supported, preclude the existence of any collective or individual monopolies. They also fully support the court's view that nothing about the motion picture business puts defendants in a category which forbids them alone and individually from enjoying the advantages of integration permitted to business generally.

However, the court below did invent a new theory for stripping away certain partial interests in theatres, not embraced in the charges and not tried, viz., that there was necessarily some unlawful restraint where a defendant owned more than 5% but less than 95% of the beneficial interest in a theatre because it thought that then "putative" competition by the holders of the remaining interests was thereby somehow restrained. Our chief argument in this

brief on this point is that this unprecedented conclusion was clearly legal error, aggravated by the court's refusal to permit an opportunity to be reserved to present facts to lay bare the error. These errors have an especially heavy impact upon Paramount as they may affect over one-half of all its theatre interests which are estimated to be valued at approximately $63,000,000 (R. 824).

But before discussing these errors, it seems desirable to outline the basis for the court's correct conclusion that it is lawful for a defendant individually to engage in the exhibition business in its own wholly-owned theatres. Against this background, the treatment of ownership of partial interests in theatres with non-defendants appears quite unjustified.

**A. The court was clearly right in denying the Government's demand for divestiture of the exhibitor-defendants' respective theatre interests.**

The court below rejected the Government's request for a judgment holding that it was unlawful *per se* for a distributor to own or operate theatres or to own stock in corporations owning, leasing or operating theatres, and decreeing divestiture of such ownership. Instead it expressly held that a distributor or owner of pictures was lawfully entitled to own theatres. The court said (R. 3554; 66 F. Supp. 354):

> "Each defendant had a right to build and to own theatres and to exhibit pictures in them, * * *"

This conclusion was inescapable since there is nothing *per se* illegal in vertical integration of the manufacturing and sell-

ing functions of an industry. *United States* v. *Winslow*, 227 U. S. 202, 217 (1913); *Eastman Kodak Co.* v. *Federal Trade Commission*, 7 F. (2d) 994 (C. C. A. 2, 1925), aff'd 274 U. S. 619 (1927), *United States* v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288 (E. D. Mo., 1931); see *United States* v. *United States Steel Corporation*, 223 Fed. 55 (D. C. N. J., 1915), aff'd 251 U. S. 417 (1920), and there was no proof to warrant findings and conclusions justifying a decree of divestiture.*

The court below made findings, supported by substantial proof, which conclusively negative the existence of any state of facts which would make divestiture a proper remedy. The major findings may be summarized as follows:

**1. No monopoly.**

In 1945 there were about 18,076 motion picture theatres in this country of which the five theatre-owning defendants altogether had interests in only 3,137 or about 17.35% (Finding 118, R. 3684). Nearly 15,000 theatres in the country, therefore, were wholly independent of any defendant. The court found:

> "119. The present theatre holdings of the five defendant-exhibitors, Paramount, Loew's, Fox, RKO and Warner, aggregate little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do not and cannot, collectively or individually, have a monopoly of exhibition." (R. 3684)

*In the motion picture industry the right to integrate is given added support by the Copyright Law (17 U. S. C., quoted in part in Appendix A) which grants the exclusive right to exhibit to the copyright proprietor, which is ordinarily the producer or distributor of the picture. This necessarily includes the right to exhibit in the copyright proprietor's theatres and to license others to do so in their theatres.

It is, of course, apparent that the holdings of any defendant individually are relatively so small that they could not possibly be considered monopolistic on a national scale, which is the scale in question in this case. There was no showing of any unlawful monopoly in any individual locality and the court found none (R. 3554; Finding 153, R. 3690). Paramount, the largest single holder of theatre interests, has an interest in less than 9% of the theatres in the country and all the other defendants in the aggregate hold interests in less than 10%. Paramount's theatre interests are represented in only 516 out of 16,752 incorporated cities or towns (R. 1935).* Moreover, the evidence disclosed that there are at least 1,149 places in the country with populations of over 5,000 where all of the theatres are independent (Ex. P. 26).

The non-monopolistic character of Paramount's theatre holdings is further emphasized by the diverse nature of its holdings. It holds stock interests ranging from 12½% to 100% in various companies owning, leasing or operating about 1,550 theatres directly or through subsidiaries. Its stock interest amounts to control, (i.e. over 50%), of

*In a large majority of the cities and towns throughout the country with populations of less than 25,000, all of the theatres are independent (R. 1180). There are 92 cities with a population of 100,000 or more (R. 751). There are independent theatres in all of them and independent first-run theatres in 54 of them (R. 752-762, 844-867; Ex. 428). There are 320 cities with a population of 25,000 to 100,000 (Ex. 82). In 196 of these the first-run theatres are all independent and in 71 there are independent and affiliated first-run theatres. (Exs. 41, 42, 57, 82, 94, 126, 127, 128). There are 1,630 cities with a population of 5,000 to 25,000. In 1,090 all the theatres are independent (*cf.* Ex. P. 26) and in 222 there are both affiliated and independent theatres, and in 108 there are no theatres at all. There are 4,627 towns with a population of 1,000 to 5,000. In 24 of these there are both affiliated and independent theatres, and in such of 4,483 as have any theatres at all they are all independent.

companies directly or indirectly owning, leasing or operating only about 500 of these theatres, (about 3% of the national total), and its interests in the balance are represented by 50% or less of the stock of the operating companies (R. 824). In fact, it operates only three theatres, the "Paramount" in New York, the "Paramount" in Brooklyn and the "Newman" in Kansas City, Missouri (R. 827), all of which are operated by wholly owned subsidiaries. As to all other theatres, local companies—over whose officers and employees Paramount exercises no control—conduct the actual operations of their respective theatres, including the negotiations for and the "buying" of all pictures from all distributors, as well as all matters of policy, problems concerning booking, license fees to be paid, and play dates (R. 828-9, 831-2, 964-6, 986-7). These local companies are operated completely independently of each other and of Paramount (R. 891-2).*

There is no evidence in the record as to the gross license fees received annually by all of the distributors in the field, since the Governments' proof was confined to showing the license fees received by the defendants in the case. As we have pointed out, there are important distributors who are not defendants, but even disregarding the license fees which they receive, and dealing only with license fees received by defendants, including Paramount, all of the theatres in

*It will be recalled that the charge was that ownership *and control* of theatres restrained competition and that it was not claimed that mere ownership of an interest not amounting to control had that effect. In Paramount's case, as we have shown, it has stock control of no more than about 500 theatres or about 3% of the national total. There is no single "Paramount Circuit" which could, even if it would, exercise its "buying power", and there is no "cooperative buying" among the separate operating companies in which Paramount is either wholly or partially interested.

which Paramount has any interest whatsoever pay to all of the eight defendant-distributors only about 16.8% of the license fees received by all of them. This is far short of a monopoly of exhibition.

**2. No intent warranting divestiture.**

The court below found that there was no substantial proof that any of the defendants was organized or had been maintained for the purpose of achieving a national monopoly either in production, distribution or exhibition of motion pictures (Finding 152, R. 3689-90).

It concluded that even in those places where a single defendant owned all of the first-run theatres there was no sufficient proof that this situation had been brought about

> "* * * for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants." (Finding 153, R. 3690)

As the court below expressed it

> "* * * Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. * * *" (R. 3554).

Paramount's intention in acquiring theatres in the first place was to obtain outlets, meet competition and market its pictures (*supra*, pp. 21-26).

### 3. No conspiracy or agreement warranting divestiture.

The court below was unable to find any substantial proof which would call for a finding that the defendants had entered into an agreement or conspiracy to monopolize production, distribution or exhibition. On the contrary it concluded, as to production, that there had been no violation of the Sherman Act whatsoever (Conclusions 3, 5 and 6, R. 3678, 3691). It determined, as to distribution, that with the exception of the trade practices and agreements which it disapproved, there was "general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures" (R. 1062, 3554; 66 F. Supp. 354).

It examined the exhibition field as well and saw that there too the defendants competed with each other and with independents for the patronage of the movie-going public. It had before it data respecting the 92 cities in the country having populations over 100,000, a fragment quite arbitrarily plucked from the national scene by the Government and stressed in an attempt to gerrymander the defendants into a monopoly of some segment of the market. Even there it found that in the majority of those cities, there was competition in exhibition between the defendants or between one or more of them and independents (Finding 146-150, R. 3688-89). The court noted that there was independent theatre competition in all of them on some run (Finding 147, R. 3688), and that in a few of those cities there are no affiliated theatres at all (Finding 148, R. 3688). In the 38 of the 92 cities (Finding 148, R. 3688-9), in which there were no independent first run theatres, the evidence showed that the affiliated theatres in those cities were the best

theatres there (R. 751, 763).* There was no evidence and no finding that this situation had been brought about or was maintained unlawfully, or that independents had been unlawfully excluded from building or acquiring theatres suitable for first run in any of the cities.

The court below was well aware of the fact that during the ten-year period from 1935-1945, the number of theatres operated in the United States grew from 13,386 to 18,076 (Finding 145, R. 3688), an increase of 4,690 theatres, a very large majority of which were independent. The fact that there was such an increase in the number of independently operated theatres, is quite inconsistent with any suggestion that the defendants, alone or in conspiracy, sought to monopolize the exhibition field. The increases and decreases in the theatre holdings of the respective defendants show no pattern of consistent action which could even suggest monopolization; they strongly refute any such inference (Exs. 151, 153, L. 12; Findings 31 and 32, R. 3665; Finding 22, R. 3664; R. 1556-8; R. 1599-1600).

**4. Divestiture unwarranted.**

After its study of the industry, the court considered that divestiture would be injurious to the defendants and damaging to the public (Finding 155, R. 3690) and would

*The Government's claim that each of the defendants received all of its first run revenue in these 38 cities from theatres affiliated with a defendant is wholly without significance. Of more significance is the fact that 69% of Paramount's film revenue (exclusive of that received from its own affiliated theatres) comes from independently operated theatres (Ex. P. 23). RKO receives 56.9% of its gross revenue and Warner 61.6% of its gross domestic revenue from independent theatres, (Finding 136, R. 3687; Finding 138, R. 3687). Independents pay Fox 60.8% of its film revenue (Finding 1144, R. 3688) and the eight defendant distributors in the aggregate receive 54.8% of their total film revenue from independents (Finding 128, R. 3686).

only withdraw the defendants from competition in exhibition (R. 3551, 3556, 2559; 66 F. Supp. 353, 356, 357). It found that the practices of which it disapproved and which it held created the illegalities and unlawful restraints were not caused by, or the result of, ownership of theatres by the defendant distributors (Findings 154, R. 3690). It thus rejected the Government's claims that divestiture of theatres was necessary or appropriate.

In the light of the obviously correct conclusion that it is not unlawful for a distributor to acquire and own theatres outright, and in the absence of proof of illegal acquisition, it was, however, inconsistent for the court to hold that less than complete ownership *per se* restrains competition unlawfully without any inquiry into the facts of each co-ownership to determine whether, in fact, competition between the parties has been eliminated or unreasonably restrained. The court made no such inquiry and, indeed, refused to provide in the decree for such an inquiry, at some future time. So, while the court was right in refusing the divestiture requested by the Government, it was, we maintain, wrong in creating a new theory which forbids partial interests in theatres, especially when it refused to provide any procedure by which the true facts as to the effect of such holdings could be established.

**B. The Court Erred in Directing the Termination of Partial Theatre Interests Held by Defendants and Independents, as defined by Section III (5) of the Decree.***

The conclusion that co-ownership between an exhibitor defendant and an "independent" is, without more, illegal, and that such relationships should be enjoined, is contained

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*The error of which we complain here, and in this brief, solely concerns the court's treatment of joint interests between a defendant and an "independent" as set forth in Section III (5) of the decree and in the findings and conclusion quoted in the text of this sub-point.

Our argument does not concern joint interests between defendants, nor does it concern the "pools" and profit-sharing arrangements which pools and arrangements were the subject matter of

in a few paragraphs of the Findings, Conclusions and Decree, which, so far as pertinent, are here quoted:

*Findings*

115. "* * * When a defendant or an independent* owns an interest of 5% or less, such an interest

Findings 112, 113, 114 and the first two sentences of 115, and also of Conclusion 9(a) and Section III (2), (3) and (4) of the decree. Nor are we concerned with Section III (5) of the decree insofar as it relates to joint interests involving at least two defendants. Paramount does not attack the decree with respect to such arrangements and relationships because it had dissolved many of them long before trial, and has now dissolved all of the remainder of those with other defendants and with non-defendants to the full extent of its ability to do so, and does not intend to continue, or hereafter enter into, such arrangements. Accordingly Paramount does not object to the implementation by the decree of a policy which it has already adopted in connection with such arrangements and relationships.

This Court should know, however, as respects the arrangements the propriety of which, as above stated, will not be argued, that some of the relatively few agreements pooling the operation of theatres in specific cities stemmed from reorganization plans authorized by Bankruptcy Courts as a means of settling claims of one company against another, and others were entered into in the depression years as a means of effecting economies in operation to prevent bankruptcy. The evidence was that the agreements did not result in a decrease in the flow of films or have any other effect on interstate commerce, and that in no case did they result in increased admission prices, but that in fact, in some cases, admission prices were reduced (R. 989-91, 1037-9, 1930-3, 2114-7). As this evidence was not contradicted, we assert that there was no proof of intent to violate nor of violation of the antitrust laws.

While we believe that the distinction between the situations the legality of which we will argue, and those which we will not, is clear, the conjunction of the situations in the findings suggests that the court below did not perceive the distinction and, instead, assimilated joint interests between a defendant and non-defendants with the pools and joint interests between two or more defendants of whose banning by the decree we do not now complain, and thus swept lawful interests into the category of those which it condemned chiefly because they involved agreements between defendants.

*The term "independent" is defined in Finding 1 as "a producer, distributor or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant". (R. 3660)

is *de minimis* and only to be treated as an inconsequential investment in exhibition."

116. "When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently." (R. 3683)

*Conclusions of Law*

9. "The exhibitor-defendants * * * have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures * * * in violation of the Sherman Act by: * * *

(b) Jointly owning motion picture theatres with each other and with independents through stock interests in theatre buildings; * * *" (R. 3693)

*Decree*

III. "Each of the defendant-exhibitors * * * is hereby enjoined and restrained:

(5) From continuing to own or acquiring any beneficial interests in any theatre whether in fee or shares of stock or otherwise, * * * in conjunction with an independent* [meaning any former, present or putative motion picture operator which is not owned or controlled by the defendant holding the interest in question,] where such interest will be greater than 5% unless such interest shall be 95%

*It is not clear whether the definition of "independent" as set forth in the bracketed material in the decree is intended to be coextensive with the definition of "independent" appearing in Finding 1.

> or more * * * the relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. * * * (R. 3698-3699)

It is to be noted that, except for the finding of the simple fact that there are co-ownerships, Finding 116 is merely an argument or contention as to their effect and is not a genuine finding of fact. *Cf. Stuyvesant Fire Ins. Co.* v. *Sussex Fire Ins. Co.*, 90 F. (2d) 281, 283 (C. C. A. 3, 1937), cert. den. 302 U. S. 742 (1937).

We believe that the court below erred in at least the following respects: in decreeing the termination of 5% to 95% partial interests without a hearing; in reaching Conclusion 9(b) (R. 3693) without findings adequate to support it; in indulging in and relying upon the blanket assumptions set forth in Finding 116 (R. 3683) the validity of which is contradicted by the record; and in concluding, in substance, that joint ownerships of motion picture theatres between an exhibitor-defendant and independents, through stock interests in theatre buildings, are illegal *per se*. In the light of those errors, the drastic injunction imposed by Section III(5) against the continuance and creation of such co-ownerships is incongruous and unjustified.

**1. The court below erred in holding 5% to 95% co-ownerships with independents illegal and in decreeing their dissolution, both without a hearing**

The complaint did not charge, and the proof was not directed to a showing that the ownership by any defendant with an independent of a partial interest had any unlawful purpose or any effect upon competition between the co-owners, much less that any "putative" competition of the

other co-owners was thereby illegally eliminated.* Since the issue was not raised at the trial and not mentioned during its course, the defendants had no occasion or opportunity to offer evidence to meet it.

The first intimation that defendants had of the wholly new line which the court below was to take in condemnation of their respective partial interests in theatres was when the court handed down its opinion on June 11, 1946, more than six months after the close of the trial. Then, for the first time, it appeared that the ownership by a distributor of a partial interest in a theatre or in a company operating theatres was considered unlawful because it was thought to restrain competition in exhibition between the defendant owner and "independent" co-owners.

On being confronted with the court's opinion, the defendants promptly submitted proposed findings of fact and a proposed decree to the court and directed its attention to its manifest error. A decree was proposed by defendants which, while conforming to the opinion in respect to the injunction against continuing to hold partial interests with an independent or with another defendant, would have per-

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*The complaint did not charge that mere co-ownership of theatres by an exhibitor-defendant and a non-defendant was illegal *per se*. Section D of the complaint, which contains numbered paragraphs 170 to 177 (R. 3196-7) concerns "Combinations of Which Each Producer-Exhibitor Defendant is a Member Which are Illegal Per Se." There appears to be no suggestion of a claim that such co-ownership is illegal *per se*. There is a charge in paragraph 176 that the producer-exhibitor defendants and their subsidiaries used coercion in acquiring interests in some theatres, but this charge was abandoned and not pressed or proved at the trial and there is no finding which lends it support.

The proof in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944) of predatory acquisition by Crescent and its subsidiaries is wholly lacking here.

mitted a defendant in any case to apply to the court for permission to retain a given interest, if, after hearing, the court should find that its retention would not result in an unreasonable restraint of competition in exhibition within the particular competitive area in which the theatres affected were situated (Defendants' Proposed Decree R. 3610).*

These proposals would have enabled a defendant to show to the court situations where its ownership of a partial interest with another person in fact did not have the effect upon competition which the court assumed was inherent in these less than total ownerships, and would have enabled defendants to show the reasonableness of and justification for a given partial interest. The court below, however, rejected the proposals and thus deprived the defendants of any opportunity to present the facts in any particular situation. It entered a decree containing the blanket injunction in Section III (5) (R. 3699-3700).

Defendants promptly moved to amend the decree to permit applications to the court similar to those provided for in their proposed decree (R. 3704). The court below denied the motions (R. 3719-20).

The action of the court in granting this injunctive relief upon an unpleaded and unlitigated issue, long after the

*Defendants also suggested in their proposed decree, as a facet of the more general right of application, that they also be permitted to apply to the court for permission to retain certain partial interests where the existing relationship had resulted not from the purchase by a defendant of its partial interest, but by a sale of a partial interest in a previously wholly owned operating company, and where the sale had occurred as a result of and during bankruptcy or reorganization proceedings (Defendants' Proposed Decree, R. 3619-20). This would enable a defendant to show that there was no restraint in any such relationship.

proofs had been closed, does not comport with the court's usual standards of fair hearing and procedure. Even a court naturally anxious to close its part in a long case conducted under an expediting certificate, should have made some provision in its decree to provide an opportunity for hearing of particular applications on particular facts after the need for a three-judge court had expired.

This was not unlike the action that was condemned by this Court in *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937) where an order declaring appellant's rates excessive was reversed as being a denial of due process. At the hearings, the issue had been the value of the company's property as of a date certain, June 30, 1925. "Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted," the Commission, in its decision and report some years later, in 1934, fixed a valuation for the property for each year from 1926 to 1933, inclusive, relying upon judicial notice of price trends to supply the deficiencies in the record. "The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and rebut them. The response was a curt refusal." Mr. Justice Cardozo for a unanimous Court, held (301 U. S. at 300):

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.
>
> "* * * This is not the fair hearing essential to due process. It is condemnation without trial."

Paraphrasing from *West Ohio Gas Co.* v. *Public Utilities Commission (No. 1)*, 294 U. S. 63, 70 (1935), Mr. Justice Cardozo said (301 U. S. at 306):

> "There was no suitable opportunity through evidence and argument . . . to challenge the results."

To the same effect, see *Saunders* v. *Shaw*, 244 U. S. 317 (1917), wherein the Louisiana Supreme Court on rehearing had reversed a judgment, relying on evidence which had been offered by the plaintiff, but which the defendant had not had an opportunity to rebut because of its rejection by the trial court. The defendant successfully raised in this Court his claim that due process had been denied him. Mr. Justice Holmes said for the Court, at page 319:

> "He [defendant] now presents his writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view."

In the present case there was no intimation, up to the time that the court handed down its opinion, that the ownership of a partial, rather than a total, interest in a theatre or operating company was considered unlawful. Accordingly, the defendants were not called upon to produce evidence on this question not in issue. They took advantage of the first

available opportunity, that is when they submitted their proposed decree, to assert that they had been deprived of their right to present evidence which would refute the court's conclusions as to the effect of partial ownership. The trial court exceeded its powers when it denied defendants the right to make such a showing. *Ohio Bell Tel. Co.* v. *Public Utilities Commission* (*supra*); *Saunders* v. *Shaw* (*supra*); *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930).

The procedure proposed by defendants would have involved no delay in the termination of the decisive phase of the litigation. They asked merely that they be afforded a later opportunity to apply to the court to be relieved in specific situations. As the court was reserving jurisdiction, this was a procedure which would have given the defendants the very minimum of protection and, without regard to its precise form, it was certainly grave error to deny this or any other opportunity to present evidence on a subject of such importance to defendants.

Quite aside from considerations of a fair hearing, the court below reached a wholly unwarranted conclusion, as we now show.

**2. The Findings are Inadequate to Support Conclusion 9(b)**

Conclusion 9(b) brands as violative of Section 1 of the Sherman Act all situations wherein an exhibitor-defendant and an "independent" jointly own motion picture theatres through stock interests in corporations owning the buildings. Such a broad conclusion requires, to support it, findings that in all, or even in enough to justify an inference that in all, of those situations the co-owners had entered into agreements or understandings to do or refrain from doing something, the purpose or effect of which was

to restrain trade unreasonably. That is the factual substance of a violation of Section 1. Yet, there was no such finding.

**3. The blanket assumptions contained in Finding 116 are contradicted by the record**

Finding 116 is in essence nothing more than a series of conclusory assumptions based upon the single fact shown that the major defendants owned interests in theatres jointly with non-defendants. The court assumed from that fact alone that "both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures"; then assumed that "the major defendant thereby eliminates putative competition between itself and the other joint owner", and finally further assumed that each such joint owner "otherwise would be in a position to operate theatres independently." It will be noted that the last assumption is based upon the further assumption that by owning a more than 5% interest in a theatre in which Paramount, for example, is interested, a non-defendant is thereby necessarily precluded from operating theatres independently, and that such a result is necessarily a violation of Section 1 of the Sherman Act as a matter of law. None of these assumptions was supported by any proof whatever. There was no testimony as to the effect on competition of such co-ownerships. There was no proof that but for such co-ownership the parties would have competed in exhibition. The evidential basis for such broad assumptions was wholly lacking.

Furthermore, the conclusion implicit in the decision, that in each instance of co-ownership, competition is necessarily unreasonably restrained, is inconsistent with the

facts and the evidence as to the genesis of Paramount's joint interests, for the record does show that certain existing co-ownerships had such diverse origins that there are no factual common denominators present upon which such overall assumptions could have been rightly predicated.

Paramount owns stock interests amounting to between 12½% and 95% with non-defendants in companies directly or through subsidiaries owning, leasing or operating about 975 theatres. In many cases where it now owns less than all of the stock of an operating company, it once owned it all, but was forced by financial difficulties, which resulted in its bankruptcy and reorganization and the bankruptcy or reorganization of some of the operating companies during the period between 1933 and 1935, to dispose of a portion of its interest in an operating company. This disposition of part of the stock of the operating company, in accordance with a plan of reorganization under the Bankruptcy Act which was approved by the District Court for the Southern District of New York, resulted in the present division of the stock between Paramount and its co-owner in a number of instances (Findings 9-11, R. 3662-3). For example, in 1929 Paramount owned all of the stock of the A. H. Blank Circuit of about 19 theatres. As a result of reorganization and in those proceedings Tri-State Theatre Corporation was formed which was owned 50% by A. H. Blank interests and 50% by Paramount (Ex. 85; R. 898). Paramount once owned all of the stock of the Saenger Circuit of about 104 theatres and in 1935 it sold a 50% stock interest therein to E. V. Richards (Ex. 85; R. 894-5, 898). In its reorganization proceedings Paramount was forced to return 50% of its original 100% interest in the Comerford Circuit of about 60 theatres to the original owners, as it also did in the cases of the Interstate Circuit and Texas Consolidated Circuit, involving together about 90 theatres (Ex.

85; R. 898).* Paramount's 100% interest in the G. B. Circuit of about 15 theatres in western Massachusetts was reduced to about 52% (Ex. 85; R. 898). Its partial interests in Dominion Theatres, Inc. in Virginia and in Penn-ware Theatres in Pennsylvania were created by sale of a part of the stock to their present co-owners. It has been held in the last mentioned instance that the sale did not result in an unreasonable restraint of trade. *Ball* v. *Paramount Pictures, Inc.*, 67 F. Supp. 1 (W. D. Pa. 1946).

Details of this kind point up the incongruity and error of the conclusion below that partial interests are unlawful *per se*. If Paramount had not had financial difficulties, its 100% ownership in these various theatre circuits would have been lawful under the court's conclusion that a distributor may lawfully own theatres if the interest exceeds 95%. When Paramount was constrained to sell a portion of its interest, what possible restraint on competition or other illegality was introduced? No considerations that appeal to reason suggest that this is a logical penalty for the consequences of financial distress. Not only did the court refuse to give defendants a general opportunity to present evidence to show that such transactions involved no unlawful restraints, but it rejected a paragraph in their proposed decree which would have permitted consideration of just such cases of post-reorganization partial interests (R. 3619-20).

Furthermore, there was no finding as to the purpose for which, or the manner in which many of Paramount's

*Paramount had originally bought the entire interest in the Comerford Circuit. When it was unable to meet its payments and was in default, a settlement of its obligations was made under which the Comerford interests re-acquired a 50% interest represented by prior preferred stock giving them control of the management of the theatres (Ex. 58).

other partial interests were created except those findings that it had acquired interests in theatres in order to obtain outlets for Paramount pictures which were being frozen out of the market by the activities of First National, referred to above (Findings 4-8, R. 3661-62). It had no policy of acquiring partial rather than complete ownership when it made these acquisitions, each one being determined according to the merits of the particular situation (R. 608). Paramount's theatre interests are all represented by stock in operating companies. Theatres operated by these companies are scattered over the country in large cities and in small ones (Ex. 161). In the majority of places there are competing theatres, but some places are too small to support more theatres (R. 870-1). Many of the theatres were constructed by the operating company or its predecessors, others were existing theatres acquired in fee or by lease (Ex. 85). Some old theatres have been completely remodeled, enlarged and modernized (Ex. P. 25). Since the time when Paramount originally obtained its present partial interest, or it was created by a sale by Paramount of part of its holdings, many changes have occurred in the theatre holdings of particular operating companies. Theatres have been destroyed or sold, or leases have been lost and not renewed, and new theatres have been built or acquired by the operating companies (Exs. 8, 65). Some of the original co-owners of stock in the operating companies have died and their interests have devolved upon their widows or heirs who now own the stock of their decedents as investments. Other former co-owners have voluntarily sold their stock to Paramount so that it now owns it all (R. 606-7, 871, 890; Ex. 85). Changes have presumably occurred in the competitive situation in towns where the theatres were situated when Paramount acquired its in-

terest or the joint interest was created. New independent theatres have been built or old ones have been modernized (Ex. P 25). Despite these indications that the origins of co-ownership are so diverse that generalizations are impossible and each co-ownership must be examined on its own facts before any conclusion as to its legality can rightly be drawn, there was no finding as to what the actual competitive situation was in the large majority of the cities or towns where Paramount's affiliates or any other defendants have theatres or theatre interests. It was expressly found that Paramount was not a monopoly and that no monopolies had been shown even in any locality where Paramount or some other defendants owned all of the theatres or all of the first run theatres.

Not only do the absence of relevant findings, the evidence as to the diverse origins of co-ownerships, and the deficiencies in proof point to the incorrectness of the assumptions indulged by the court below, but additional facts can be pointed out which flatly contradict certain of those assumptions.

In *Ball* v. *Paramount Pictures Inc.*, 67 F. Supp. 1 (W. D. Pa. 1946) a private anti-trust case involving a theatre in Pennsylvania which had been operated by a wholly owned subsidiary of Paramount and in which subsidiary it had sold a 50% interest to a non-defendant, the court held, after hearing, and after the opinion below had been rendered, that such sale did not result in an unreasonable restraint of trade. Yet, under the decree in this case, it appears that that very joint ownership would be subject to dissolution on the theory that, contrary to the actual facts, such sale created an unreasonable restraint of trade as a contract, combination or conspiracy in violation of Section 1 of the Sherman Act. All this the court below has concluded

upon a record which shows nothing more than that Paramount owns 50% of the stock of the company operating that theatre and that the balance of the stock is owned by a non-defendant. The result reached in the *Ball* case shows that the assumption of the court below with respect to that particular situation was wrong, or at least ill considered, since if it had had before it all of the facts which were before the court in Pennsylvania, or analogous facts with respect to similar situations it might well have reached the same conclusion that that court reached.

**4. Joint ownerships of theatres are not illegal *per se*.**

Even if Paramount and a present part owner of a present operating company had been in competition in exhibition prior to the creation of the co-interest, the resulting co-ownership would not *per se* be unlawful any more than would be the ordinary creation of a partnership, or the creation of a corporation to carry on as a unit the businesses of two former competitors.

This is clear from *United States* v. *Aluminum Co. of America*, 148 F. (2d) 416 (Special Statutory Court, 1945) in which Alcoa had purchased a 50% share in the stock of a corporation formed by the combination of five of Alcoa's competitors in the manufacture of aluminum castings. The corporation later leased all its property to Alcoa for 25 years. Nevertheless, the Court held that the transactions did not violate either section 1 or 2 of the Sherman Act. It said (at p. 435):

> "We cannot see that in all this the plaintiff has proved anything relevant to the action. If it means that there was a monopoly of the castings market as such, there is no support whatever in the record for such an assertion. If it means that 'Alcoa's' inter-

> vention in the castings business helps to support its claim that 'Alcoa' monopolized the ingot market, the inference is extremely weak. Finally, there was nothing in the transactions themselves which indicated that they were independently unlawful, or that they served to make 'Alcoa's' legal position as to the ingot industry less vulnerable than it would otherwise have been."

And see similar comments made by Judge Learned Hand with respect to Alcoa's 31% ownership in a combination of three corporations engaged in the aluminum cooking utensil business. Such ownership was held to be no support whatever for "the conclusion that here was a practice or manoeuvre merely to suppress or exclude competitors" (148 F. (2d) at 435-6).

Since Alcoa, which had an unlawful monopoly in aluminum ingot, could, without further violation of the Sherman Act, acquire a part interest in a group of corporations which had been its competitors in the manufacture of a finished aluminum product, then *a fortiori*, the defendants here, which have no monopoly of production, distribution or exhibition, had the right to acquire part interests in theatres not even shown to have been their competitors and, likewise, to sell part interests in theatres, without running afoul of the Act. This is merely corollary to the well established rule that the Sherman Act interdicts neither integration *per se* nor merger *per se*. *United States* v. *Winslow*, and other cases cited *supra*, p. 34. See, also *United States* v. *Columbia Steel Co.*, C. C. H. Fed. Trade Reg. Serv. (9th Ed.) par. 57,639 (D. C. Del., Nov. 7, 1947), not yet officially reported.

As Mr. Chief Justice Hughes wrote for this Court in *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344 (1933):

(p. 360) "The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains'. *Chicago Board of Trade* v. *U. S., supra* (246 U. S. 231). The familiar illustration of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. * * * (p. 377) The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agent to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be permitted by business exigencies and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize".

**5. The inadequacies of the Findings and the invalidity of Conclusion 9 (b) render insubstantial the purported basis for the drastic provisions of Section III (5) of the decree.**

In spite of the absence of any claim or finding that the creation of the interests ordered dissolved was itself violative of the Sherman Act, or of any finding of unlawful agreement or conspiracy between the companies the fission of whose affiliation is decreed,* and despite the invalidity of

*It should be noted that no claim was made by the Government that ownership by a defendant of stock in a theatre operating company constituted a violation of those provisions of the Clayton

Conclusion 9 (b), the court below entered a decree which, in Section III (5), is far more drastic than any heretofore approved by this Court.

In *United States* v. *National Lead Co.*, 332 U. S. 319 (1947), this Court refused a request by the Government to add a provision to the decree requiring divestiture of a plant by each of the principal defendants found guilty of unlawful patent pooling and of making agreements restraining interstate and foreign commerce. This Court said:

> "We believe there is neither precedent nor good reason for such a requirement. The violation of the Sherman Act is found in these cases in the patent pooling and in the related agreements restraining interstate and foreign commerce. There is neither allegation in the complaint nor finding of fact by the District Court that the physical properties of either National Lead or du Pont have been acquired or used in a manner violative of the Sherman Act, except as such acquisition or use may have been incidental or related to the agreements above mentioned. The cancellation of such agree-

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Act relating to acquisitions of stock of competing corporations (15 U. S. C. 18). If such a charge were made, it would, of course, have been necessary for the Government to allege and prove that the acquisition unreasonably and substantially lessened competition. *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291 (1930); *Pennsylvania R. Co.* v. *Interstate Commission*, 66 F. (2d) 37, (C. C. A. 3, 1933), aff'd 291 U. S. 651 (1934)). And even in a Sherman Act case there must be allegation and proof that a combination unreasonably restrains trade. It should not be conclusively assumed, as it was by the court below, that in every case where a defendant holds more than 5% of the stock of a theatre operating company this *ipso facto* unreasonably restrains competition.

ments and the injunction against the performance of them by the appellant companies eliminate them.

* * *

* * * It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion."

*U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944), and *Standard Oil Co.* v. U. S., 221 U. S. 1, (1911) each involved judicial restoration of a pre-existing separate status to properties whose combination was found to have been the unlawful act, and where it was found that the continuation of the combination of properties would result in the continuation of the unlawful condition, thus making necessary the separation of the properties in order to restore competition and insure its continuance. But in each of those cases there were findings as to the unlawful purpose of combining the properties and of the unlawful effect of continuance of their combination. Where such findings are absent, as in the case at bar, there is neither need nor warrant for a dissolution of property rights.

Here, as in *National Lead*, there was no allegation, proof or finding (1), that any theatre interest, or any interest in any theatre operating company of more than 5% but less than 95% had been acquired or was maintained to prevent competition between the defendant and the co-owner or anyone else, or (2) that specific theatres or companies in which a defendant presently owned more than 5% but less than

95% had been separately owned or operated, or (3) that the co-owners, if bought out under the decree, would re-enter the exhibition business in any place in competition with the defendant purchasing the interest. Divestiture, as the court observed, would simply "withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners * * *" (R. 3551; 66 F. Supp. 353).

Likewise, as in *National Lead*, there was "no showing of the necessity for this divestiture * * * or of its practicability and fairness", no complaint or showing having been made as to the effect of the co-ownership *per se*, or the result of the dissolution which the court directs.

Also, as in *National Lead*, the opinion and findings showed the existence of competition except in so far as the court thought it was restrained by the licensing practices of which it disapproved, and which have been adequately dealt with by specific injunction in the decree. (Findings 18, 20, 23, 59, 121, 146-8, R. 3664, 3670, 3684-5, 3688-9).

No factual justification is present for the dividing line adopted by the court between what theatre interests may be retained and what must be divested. Why 95% instead of 90%, or 80% or 50% or less? None was suggested by the Government, and none is supported by the evidence or findings.

The right to acquire property and to engage in business is a property right, *International News Service* v. *Associated Press*, 248 U. S. 215, 236 (1918), and there is no requirement that a business must be 100% or 95% or 50% owned, or that the right to engage in business exists only if the business is owned 95% or more. Paramount, in investing in less than 95% of stock in a theatre operating

company is exercising a lawful right to profit from a lawful enterprise, and it has not been charged or found to have been guilty of unlawful conduct with independents owning more than 5% of any theatre enterprise in which it is also financially interested.

The court below has simply adopted an arbitrary line to which it seeks to compel defendants to hew if they are to continue to be interested in the exhibition business.

The Government urged in its argument for divestiture based upon the claim that ownership and control of theatres by a defendant-distributor was unlawful *per se* that Paramount's corporate structure, that is, its ownership of stock of various companies operating theatres in different parts of the country, permitted it to control competition between the operating companies. However, it offered no proof from which this fact could be inferred, and there was no finding, that any of these companies would have competed with each other but for their common ownership or but for the fact that Paramount owned a part of their stock. There could be no inference that competition would have existed, for example, between the North Carolina Theatres, Inc. operating in North Carolina and the Minnesota circuit operating in Minnesota and North Dakota, or between the New England Theatre Circuit, operating in the New England states, and the Tri-States theatre operations in Iowa and Nebraska. The undisputed testimony was to the effect that each of these circuits was operated independently of any of the others in the licensing of films from all defendants including Paramount, and none of them combined their "buying power" with that of any other circuit, and none of them in any way conditioned its licensing of films from any distributor upon what deals any other circuit made with that distributor (R. 832-3, 966, 996; 1034-5).

This charge as to the effect of Paramount's structure was wholly unproved. Certainly since Paramount is permitted by the decree to retain interests in scattered groups of theatres where it owns them completely, the court below rejected this whole theory. It would be fanciful to try to justify dissolution of partial ownerships by assuming competition and its restraint, where geography, like the proof, clearly refutes the possibility of it.

The evidence does not disclose any agreements between affiliated operating companies such as those present in the *Crescent* case, *supra*, and those alleged in *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). In the *Crescent* case, it was expressly found that the violations of law were in part effected by agreements between the theatre operating subsidiaries, pursuant to which they had divided territories in which theatres might be operated by any of them, and agreements pursuant to which they had combined with each other for the purpose and with the effect of eliminating, suppressing and preventing independents from competing in the territory in which each of the operating subsidiaries had theatres (323 U. S. at 179). In the *Yellow Cab* case it was alleged that the operating subsidiaries had agreed with each other not to compete, and that there were contracts and understandings between the common owner of their stock and the subsidiaries which prevented them from competing with each other and, in addition, prevented them from purchasing cabs from manufacturers other than the common owner.

Neither of these elements is present in the case at bar. There was no finding that there had been any agreements between Paramount, for example, and any operating company owned less than 95% by it which prevented the operating company from licensing films from any other dis-

tributors, or which prevented the operating company from competing with any other theatre operator. In fact, each operating company deals separately in licensing its films from all distributors, and without dictation from Paramount (R. 828-29, 833, 891-92, 966, 996, 1035).

No operating company is at all concerned with what deals any other operating company may make with any distributor nor with its failure to make any deal at all. No deal is conditioned upon the making of any other deal between a distributor and any other operating company. Each operating company is desirous of making the best deal it can for itself for its is concerned only with the success of its own operation. There is therefore no business inter-relationship between one operating company and another. Each of them is separate, distinct and entirely independent of one another (R. 824-5, 828-9, 966, 996, 1033-4, Exs. P24 and P24A).

While the court below was correct in refusing complete divestiture and divorcement, it erred in decreeing compulsory sale or purchase of partial interests held with independents without any inquiry into the purpose and effect of the acquisition or retention of interests falling within the banned percentages. As we have shown, when this error was pointed out upon the settlement of the decree and motions to amend, the court erred, and, indeed, departed seriously from traditional conceptions of fair procedure, in not giving them an opportunity to present evidence as to the true competitive situation created and continued by particular partial interests. Such evidence, when offered on such application as might be made under a right reserved, would, it must be assumed, destroy any basis for the court's unsupported assumption that these partial interests have *per se* unreasonably restrained competition between co-owners.

**C. The Court erred in Enjoining the exhibitor-defendants from engaging in new competition in exhibition as Provided for in Section III(6) of the Decree.**

Section III(6) of the decree enjoins each of the five defendant-exhibitors forever from "* * * expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph". The only acquisition referred to in the preceding paragraph, namely, Section III(5), is the acquisition with court approval of a present co-owner's partial interest. The effect of the two sections, therefore, seems to be a complete ban upon the acquisition of additional interests in theatres and, therefore, upon fresh competition by these defendants.

In this respect the decree departs from the decree ordered in the opinion of the court below. It was there stated (R. 3562; 66 F. Supp. 359) that the decree to be entered should not

> "* * * prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the latter case, this court or other competent authority shall approve the acquisition after due application is made therefor."

The decree thus directed by the opinion was more in harmony with the analogous provision in the Consent Decree wherein it was provided (Consent Decree, Section XI, R. 3387) that

> "Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business."

In the proposed decree which the defendants submitted, a provision was inserted to carry out the directive contained in the opinion which would have permitted future acquisitions upon a showing that they were to enter new competitive fields or to protect existing investments, and the court indicated that it would not accept the Government's counter-proposal which would have enjoined the defendants from acquiring new theatre holdings in any manner whatsoever (R. 3057-8). When the court came to enter the final decree, however, it appears to have adopted without comment or finding or conclusion to support it, substantially what the Government had proposed.

In its opinion (R. 3558; 66 F. Supp. 356-7), the court stated that it thought that the remedy it was giving against the infractions found was much less drastic than that granted by this Court in *Interstate Circuit v. U. S.*, 306 U. S. 208 (1939) and less severe than this Court imposed in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944). On the contrary, the relief finally granted was, as we have shown, far more drastic in restricting competition than this Court has sanctioned. Even in the *Crescent* case, the decree permitted the defendants individually to acquire new theatres upon a proper showing to a court that the acquisition would not unduly restrain competition.* This Court said (323 U. S. 186) that the decree should "not stand as a barrier to healthy growth on a competitive basis", and

*The Government in the *Crescent* case argued that the effect of an acquisition upon competition should be the test of its legality (R. 2553). The decree in the case at bar gives the defendants no opportunity to show the effect upon competition of any of its theatre holdings or proposed acquisitions. The Government did not appeal from a decree in *Schine Chain Theatres Inc.* v. *U. S.* (argued Dec. 15, 1947 in this Court) which was analogous to the decree in the *Crescent* case in this respect.

the decree on the mandate of this Court permits the defendants to acquire theatre interests upon a showing that no unreasonable restraint will result.

The *Interstate Circuit* case involved no divestiture or divorcement, but merely the simple remedy of injunction against the specific conduct held to be unlawful.

Here the decree appealed from, in its provision enjoining future acquisitions, is far more drastic than any heretofore approved by this Court. Even in *Standard Oil Co.* v. *U. S.*, 221 U. S. 1 (1911), there was no provision in the final decree against future acquisitions of properties by the companies found to have violated the law. The decree was subsequently construed as not preventing the acquisition by one of the companies of the assets and properties of another by a merger when, upon application to the court for approval, it was shown that the merger would not unreasonably restrain competition either between the parties to the proposed merger or between the combination and others. *United States* v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288 (E. D. Mo., 1931). So, too, the decree in *United States* v. *E. I. Du Pont de Nemours & Co.*, 188 Fed. 127 (C. C. Del., 1911) has been construed so as to permit Hercules Powder Co.—one of the corporations created by that decree—to acquire the physical assets and other properties of Aetna Explosives Company. *United States* v. *E. I. Du Pont de Nemours & Co.*, 273 Fed. 869 (D. Del., 1921).*

*More recent decrees, like the *Crescent* decree, have expressly reserved to defendants the right to acquire additional properties upon approval of the District Court, granted after a showing by the defendant that the acquisition does not and is not intended to have the effect of unreasonably restraining trade or of creating a monopoly. See, for example, paragraph 27 of the decree in

In no case have we found a litigated decree containing a blanket perpetual injunction against future acquisitions such as was entered below. Even in *United States* v. *Swift & Co.*, 286 U. S. 106 (1932) where the defendant packers agreed in a consent decree to be enjoined permanently from owning retail stores, etc., this Court recognized that the court might, in a proper case, permit such acquisitions, but such relief was not directed because of the failure of the packers to prove that the conditions which led to the prohibition had so changed at the time the application for relief from it was made as to make the prohibition no longer necessary to insure free competition.

On the argument of the motion to amend the decree, the trial court suggested with respect to this injunctive provision, that the provision retaining jurisdiction to amend would protect defendants sufficiently (R. 3102). But, obviously, this is not so. In the light of the *Swift* case, it would be almost an insuperable task for the defendants to succeed in amending the decree at some future time, whereas they might very well, on an application to the court under an express provision providing for such application, be able to convince it that a particular acquisition should be permitted in order to enable the defendant to enter a competitive field or to protect an existing investment, while at the same time being under a general injunction against undue general expansion of its theatre holdings.

Not only is the present injunction without precedent and inconsistent with the court's own opinion, but it is inconsistent with the policy of the Sherman Act. That Act

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*United States* v. *Pullman Co.*, 55 F. Supp. 985 (E. D. Pa., 1944); for full text of decree, see C. C. H. Fed. Trade Reg. Serv. (9th Ed.) par. 57, 242, at p. 57, 374.

contemplates that decrees under it shall remove illegal fetters on competition, *not* that they shall themselves shackle competition. It has been contended that the effect of this injunction is to prevent a defendant from acquiring any interest in any theatre in which it is not presently interested and thus to deny to the public the benefits of theatre competition by the defendants in any area where they do not now own theatres. Yet it is there that their competition would be most stimulating. And, in the absence of an opportunity to satisfy the court that some new acquisition might merit its approval, the court below certainly erred in confining defendants' theatres arbitrarily to their present locations. If, as it correctly held, they are lawfully entitled to own theatres, they should not be alone denied the right to protect an investment in a theatre or to exercise their lawful right in some new locale where to do so would promote rather than restrain competition.

To decree that under no circumstances or conditions may a defendant-distributor acquire a new theatre is equivalent to slow strangulation and ultimate destruction and loss of those theatre interests which the decree permits a defendant to retain. Being permitted to retain interests in wholly owned theatres, a defendant must be permitted to exist as a going concern and to acquire new theatres where it can establish to the satisfaction of the court that the acquisition would not unduly restrain competition in the place where the theatre is located.

## POINT II.

**THE COURT ERRED IN DIRECTING THAT LICENSES MAY BE GRANTED ONLY AFTER "COMPETITIVE BIDDING" AND IN ENJOINING DEFENDANTS FROM LICENSING THEIR PICTURES IN ANY MANNER OTHER THAN THAT PRESCRIBED IN SECTION II(8) OF THE DECREE.**

Section II(8) of the decree (R. 3696-7) enjoins each of the defendant-distributors from licensing any of its features for exhibition in any theatre not its own in any manner except as therein prescribed. This section contains the so-called "competitive bidding" directive.

It will at once be noted that by this provision of the decree the court below prescribes the sole method by which the defendants are mandatorily and perpetually enjoined to do business with all other theatre operators with whom they deal, and restrains defendants from dealing with their customers in any other manner, however lawful it may otherwise be. Under 8(a) each distributor is mandatorily enjoined to make its respective features available to all who desire to exhibit them upon any run which the theatre operator may select. All offers must be on "uniform" terms.* 8(b) requires that each license shall be granted "solely on the merits" and without discrimination in favor of affiliates, old customers or others.

8(c) requires notification to all exhibitors in a competitive area of the distributor's willingness to receive bids,

*If "uniform" terms means that a distributor must offer a picture to everyone for the same license fee, then this means that each theatre operator must pay the same amount regardless of his ability to do so, and regardless of the size, location, attractiveness and potential drawing power of his theatre.

requires that the offer shall stipulate a minimum flat rental acceptable to the distributor, and shall state the number of days of exhibition, the time when it is to commence and the availability and clearance, if any, which will be granted for each run, and compels licensing to the highest responsible bidder having a theatre of a size, location and equipment adequate to yield a "reasonable return" to the licensor. After the distributor has made the offer in these terms, any exhibitor desiring an exclusive run may bid, and in his bid, is allowed to set out his own terms as to license fees, run, clearance time and days of exhibition and any other terms which he wants to make.

As the defendants are enjoined from doing business in any other way, the impact of this provision of the decree upon the right of each of them to exercise the ordinary attributes of ownership of property and to control its disposition as well as the right of each to choose its customers and its right, and the right of its customers, to bargain for mutually satisfactory terms, is obvious and severe. Although the distributor is the owner and copyright proprietor of the picture, under the decree as it now stands, it has neither right of selection nor right to fix the terms upon which its property is to be used. The decree in effect makes the distributor a public utility where by statute its copyrights are supposed to assure it of exclusive rights and the right to share in those exclusive rights on such lawful terms as it as the owner may demand. Such a result appears to be properly a legislative, not a judicial function.

The right to choose customers and to state the terms on which sales will or will not be made has long been recognized by this Court. *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944); *United States* v. *Colgate & Co.*, 250 U. S. 300,

307 (1919); *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565, 573 (1924); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 452-3 (1922); *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-6 (1923); *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 582 (1923).

These rights are of particular importance in the motion picture industry because of the influence which exhibition in some theatres has on subsequent exhibitions of the picture in the area as well as throughout the country.*

Regardless of the question of the power of a district court to prescribe an exclusive method under which several (although by no means all) of an industry must "sell" their respective products, and all must "buy" their products, the question of the permissible scope of the exercise of the court's discretion at once arises.

There can be no doubt that the trial court has a wide discretion to mold its decree to the needs of the case. *U. S.* v. *Crescent Amusement Co., supra.* It may, in a proper case, "* * * prohibit acts which in another setting would be unobjectionable". *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, 409 (1945). But its discretion is not unlimited, and this Court may, and on many occasions has, modified a decree of a lower court where the terms of the relief exceeded the limits imposed by law or amount to an

*An initial exhibition in Radio City Music Hall or one of the large Broadway houses, for example, is worth infinitely more in prestige, publicity value, word of mouth advertising, etc. than an initial exhibition in a smaller, less well-known theatre (R. 1296). And even though the latter might be able to outbid the larger houses on some pictures, and pay more by playing the picture longer or at higher prices, the ultimate revenue of the distributor would suffer from loss of the prestige and advertising that the Radio City or Broadway showing affords.

abuse of discretion. *Hartford-Empire Co.* v. *U. S., supra* and 324 U. S. 570, 571-575 (1945). Modifications or deletions are made where the decree goes further than is needed to prevent future violations. A decree in a civil anti-trust suit must not be punitive in nature or create "* * * new duties, prescription of which is the function of Congress, or place defendants, for the future 'in a different class than other people', * * *" (323 U. S. 409). "The purpose of the decree, therefore, is effective and fair enforcement, not punishment". *United States* v. *National Lead Co.*, 332 U. S. 319 (1947). And in attempting to frame a decree adequate to prevent violations of the statute, the court must have in mind that "one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 78, (1911).*

In *Hartford-Empire*, this Court held that the trial court had gone beyond what was required to dissolve the illegal combination and prevent future combinations of like character, by forbidding any disposition or transfer of possession of machinery by any means other than an outright sale, and by requiring Hartford-Empire to offer to sell all machinery presently under lease and to continue to offer to

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*This Court in *Standard Oil* took pains to construe the decree as permitting defendants to make normal and lawful contracts and agreements, and not as depriving them of the "right to live under the law of the land" (221 U. S. at 80-81). The decree was subsequently construed as not prohibiting the subsequent merger of two of the companies which it separated, where the merger was found by the court not to threaten to restrain competition unreasonably. *United States* v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288 (E. D. Mo., 1931). See, also, *United States* v. *E. I. Du Pont de Nemours & Co.*, 273 Fed. 869 (D. Del., 1921).

sell machinery to any manufacturer of glassware. The decree was modified by this Court to permit disposal of machinery in other ways than sale, i.e., by leases and patent licenses. This Court held that the decree, as drawn, amounted to a confiscation of patent rights and forfeiture of the patents.

In *National Lead,* this Court held that to compel the issuance of licenses on a royalty free basis, or to issue a permanent injunction prohibiting the patentees from enforcing their patent rights, was not necessary in that case in order to enforce the antitrust laws effectively. It likewise refused a request by the Government to require the defendants to furnish to any applicant technical information desired by the applicant relating to the methods or processes for manufacture, holding that such a provision, which would, in effect, have thrown open to the world the field of technical knowledge in the industry, would discourage rather than encourage competitive research and would be contrary to, rather than in conformity with, the policies of the patent law.

Similarly, the present decree in effect confiscates, in important respects, rights given to the defendants under the copyright laws, the policy of which is similar to that of the patent laws. The copyright laws give to the proprietor of the copyright (in the case of a motion picture) the exclusive right to exhibit the copyrighted picture (17 U. S. C. 1, quoted in Appendix A). Co-existent with the right to exhibit is the right to prohibit others from doing so or to permit them to exhibit the copyright feature upon payment for such fees and terms as may be bargained for and which will give the copyright proprietor his reward. A requirement that he must offer every picture released by

him for exhibition to everyone who applies for it on such run as the applicant selects, and must license it to the highest bidder for each run, effectively curtails his right to prohibit exhibition, and takes away from the copyright proprietor the exclusive right to exhibit or permit exhibition which he is given by the law. His right to exercise the common attributes of ownership and to choose his customers is effectively curtailed because, if he wants to license the picture at all, he must offer it to every applicant and is compelled to accept the highest bid for each picture on each run, regardless of any consideration other than the amount of the particular bid.

The proper reward of the copyright may depend upon a great many factors other than the amount of a particular bid for a particular feature upon a particular run. All these considerations, however, are banned by the decree. The distributor, for example, is not permitted to license a feature to the operator of a theatre with whom it has had long-established and satisfactory business relations and who experience has taught the distributor can, over the years, pay completely satisfactory film rentals. Nor can the distributor take into account the fact that a showing of a particular picture or series of pictures in a particular theatre, with the prestige that such a showing or showings gives to the product, will prove more advantageous in enabling the distributor to get better rentals upon subsequent runs than if the initial showing is in an obscure and inferior theatre which happens to submit the highest bid.

Nothing in the recent decision in *International Salt Co.* v. *United States*, 92 L. Ed. 55 (1947) would have justified the mandatory injunction here under consideration. There the decree dealt with certain patented machines; the patentee

had abused its patent monopoly by entering into lease agreements which were unreasonable *per se* in that they tied unpatented salt products to patented machines and thus foreclosed competitors from a substantial market in salt products. Here the decree applies to licenses under copyrights on works not yet conceived, the licensing of which is already effectively regulated by various negative injunctions in the decree. The future copyrights affected by the mandatory provisions would no longer be subject to abuse in the light of these injunctions.*

The violations of law which the trial court found, and toward which this provision was presumably directed, was a conspiracy and concert among the defendants to maintain a substantially uniform system of runs, clearances and minimum admission prices (Conclusions 7, 8(a), (c) and 9(c), R. 3691-3), and among the defendants and their licensees to discriminate against small independent operators (Conclusions 8(b), (d), (e) and 9(c), R. 3692-3).

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*Moreover, in *International Salt*, the Court recognized that the sixth paragraph of the decree was properly subject to amendment and limitation and, therefore, its denial of relief from it was *without prejudice*. It was thought that under the District Court's general reservation of jurisdiction, any amendment of the decree in the light of a concrete problem would necessarily lead to "a provision that will avoid repetitious applications." But, here, the problem is quite different. To suggest an instance which is not only obvious but which, in the nature of things, would have to occur frequently under this decree: suppose two bids for a given picture proposed terms as to license fees, clearance, length and time of run, and other particulars which were so different as to make it impossible for a defendant to determine who would be "the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." Even assuming that, in such a case a sufficiently expeditious decision interpreting the decree could be obtained from the court below, it is obvious that such decision would be *sui generis*, would not avoid repetitious applications, and, therefore, would not meet the test of the *International Salt* case.

The court felt that in the situation which it believed was shown by the evidence, some theatre operators found it difficult to negotiate for and obtain desired pictures upon desired runs, that non-defendant distributors were obliged to conform to the "system" if they wished to get their pictures shown upon satisfactory runs, and that non-defendant exhibitors were obliged to conform in order to compete with the theatres to which the defendants licensed their pictures (Finding 84, R. 3674). Here we confine the argument to the question of the necessity or propriety of *mandatorily* prescribing an *exclusive* method of "selling" to prevent continuation of the conspiracy thought to exist.

If the facts are as found by the court, it would seem obvious that the violations of law could be terminated and effectively prevented by the usual injunctions prohibiting the continuation of the unlawful conduct in the future. Such injunctions, in the most sweeping forms, are included in the decree. Furthermore, Section II(9) of the decree (R. 3698) (from which we do not appeal) is sufficient in itself for this purpose as it prohibits the arbitrary refusal to license features to an exhibitor who wants them and believes he, rather than his competitor, should have them on a particular run.

The following language of this Court in *National Lead, supra,* is applicable here:

> "It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. * * *"

See also *United States* v. *Pullman Co.*, 64 F. Supp. 108, 110 (E. D. Pa. 1945).

In *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944) this Court refused to direct defendant Soft-Lite to sell its product in the future to anyone offering to pay cash for it, on the ground that it would unreasonably interfere with that company's right to select customers. It was pointed out that such a right might be the "most essential factor in the maintenance of the highest standards of service" (321 U. S. 728-9). This consideration applies with even more force in the motion picture business, since the proper selection of theatres to exhibit a picture can make or break the picture (R. 1621-4, 1634-5). Also in *Bausch & Lomb* this Court refused to enjoin Soft-Lite permanently from suggesting re-sale prices and executing re-sale price maintenance contracts under the Miller-Tydings Act, the rationale being that after a reasonable interim to dissipate the illegal practices, Soft-Lite should be permitted to attempt to act lawfully by use of methods expressly permitted by Congress. And so the defendants here should be permitted to attempt to act lawfully under the sweeping injunctions granted and not also be permanently enjoined from doing business in any other way than by the untried, complex and undeniably confusing system devised by the lower court.

Section II(8), in addition to placing defendants in a class by themselves *vis-a-vis* other present and future distributor competitors not bound by the decree, in fact restrains competition between them as it requires each to follow the same course, and prohibits each of them from gaining or attempting to gain a legitimate competitive advantage over any of the others by superior service, reasonable assurance of a supply of product and other proper business methods. It seems likely that if the defendants had agreed among themselves to license their pictures only to the highest bidder in accordance with the method pre-

scribed by the decree, such agreement would have been attacked under the anti-trust laws. Yet the court enjoins each to follow the same method as is prescribed for each of the others. It is submitted that the method devised bears no relation to the supposed evil and that it is unnecessary and impracticable for that purpose.

With respect to the merits of the licensing system devised by the court, it has been strongly urged by exhibitors (R. 2820-48), that its burdens will fall most heavily on the operator of a small theatre who is in competition with a larger one. It is said that the theatre able to produce the largest revenue will normally be able to make the highest bid for each of the pictures of each of the distributors which it wants to exhibit. If this is true, it is asserted, the theoretical right of the small operator to bid is illusory. The small theatre operator might be tempted to overreach himself on occasions and to outbid his larger rival. If he does this, he might find that he could profit on a particular picture or he might find that he has bid so high that his prospective profits disappear. He can not expect consistently to be able to pay more than the larger theatre can and he, therefore, loses the assurance of a supply of product. While such considerations are necessarily speculative and the court below apparently did not find them persuasive, they are not so extreme as not to merit consideration. In any event it seems unwarranted and unwise for the court to attempt to prescribe an exclusive system of doing business which it is claimed may well have such an adverse impact on the exhibitors whom the suit was ostensibly designed to protect.

The differences of opinion reflected upon these appeals among the defendants subjected to the competitive bidding requirements emphasize the undesirability of any such

shackling requirements for the future. None of the exhibitor-defendants other than Paramount assigned these provisions of the decree as error. It may be assumed that this action reflects a belief that the consequences envisioned by many exhibitors are not certain to ensue and confidence that the lower court will revise the provisions as experience may require. But the possibility that the exhibitors' prognosis may prove to be correct may well suggest the desirability of eliminating the present provision.

It is submitted that the injunctions contained in Section II(8) of the decree, are wholly unnecessary to accomplish what the court below thought that it was necessary to accomplish. That was to prevent the continuance of what the court felt was a system under which theatres competing with theatres which were part of a large circuit (whether or not the circuit was affiliated with a defendant) found it difficult to negotiate for and obtain desired films upon desired runs, and found that they were subjected to terms and conditions which discriminated against them in favor of the circuit theatres. Section II(9), (R. 3698) will, it is submitted, accomplish this purpose. That section enjoins defendants, as distributors, from arbitrarily refusing the demand of an exhibitor to license a feature to him on a run selected by him instead of licensing it to a competing exhibitor. This in itself is a drastic curtailment of the right of a trader to choose his own customer and exercise the ordinary incident of the ownership of his property. Thus, in every competitive situation, an exhibitor would be assured of a fair opportunity to negotiate for a license of a desired feature on a desired run, and any arbitrary refusal by a distributor to license under those conditions would constitute a violation of the decree, subjecting the defendant distributor to punishment for contempt.

To implement further this portion of the decree, and to give exhibitors an additional and speedy remedy in the case of a claim of an arbitrary refusal to negotiate with him, the defendants submitted with their proposed decree a proposal under which claims by an exhibitor that he had been arbitrarily refused a license could be arbitrated. (R. 2971-5, 2985-7.) The remedy of arbitration was not offered as an exclusive remedy, but it was proposed as an alternative and additional remedy so that the complaining exhibitor could, at his option, avail himself of the arbitration procedure or of the remedies afforded him at law (R. 2974, 2992, 2998-9). Nor was the arbitration procedure suggested as a means of insulating the defendants against contempt proceedings; it was expressly conceded that the Government would still have this remedy should there be a violation of the decree by the arbitrary refusal of a demand of an exhibitor for a license (R. 2895, 2974, 2980). The proposal of the defendants which, if accepted by the court would have taken the place of the present Sections II(8) and (9), is set forth in full in Appendix B hereto annexed.

Although this proposal of the defendants was acceptable to the same exhibitor groups who were heard by the court at the time of the settlement of the decree (R. 3032-3), as being preferable to the provisions of Section II(8), it was not adopted by the court. It is submitted that the court erred in this respect and that Section II(9) or defendants' proposal, either with or without the additional remedy of arbitration, is all that is necessary or proper to accomplish the result desired by the trial court. Section II(8) of the decree should be stricken. Section II(9) is sufficient to insure adequate opportunity to compete, but if it thought that this is in doubt, something like the defend-

ants' proposal might well be substituted in lieu of the present Sections II(8), and (9).

While it may be difficult for this Court to attempt any detailed revision of the decree in these respects, it is evident that there were areas for the exercise of the lower court's discretion which did not involve the possibility of unfortunate consequences with which its own competitive bidding requirement is fraught. Since that requirement exceeded the bounds of its proper discretion, this Court should, at the very least, remand this portion of the decree for consideration of alternatives which do not involve (a) a permanent restraint on the method of doing business which precludes normal competitive activity, and (b) possible injury to small independent exhibitors who should be free to negotiate upon the best terms that they can get, having their past record as good customers an element not to be overlooked in the course of negotiations.

This is not an argument for the retention of the status quo. It is safe to assume that the court below will be able to find some acceptable alternative which will further change the status quo in material respects without depriving reputable former customers of the right to use their reputation as one argument in their favor. The balance of the decree already insures that substantial changes in the status quo are inevitable, but the desirability of change does not indicate that the appropriate remedy is unalterable rigidity.

## ARGUMENT AS APPELLEES

In No. 79 the Government appeals from the decree and urges (1) that it is so inadequate as to constitute an abuse of discretion; (2) that the court below should have ordered divorcement by compelling divestiture of the defendants' respective theatre holdings; and (3) that pending divestiture the court should have prohibited each major defendant distributor from licensing its pictures for exhibition in any other defendant's theatres.

These contentions rest, in large measure, upon the Government's misinterpretation of facts and findings of fact, not supported by the record. We regret to note that in its statement of purported facts appearing in the brief at pages 11 to 34, many of the facts as there stated are distorted, and that the brief contains many inaccuracies and omissions, so that the statement cannot be accepted as a basis for this Court's decision of the issues. In the course of this reply, we will point out some of these errors and omissions but it would unduly extend this brief to deal with all of them.

While protesting that they "do not challenge any of what we consider to be the evidentiary findings" and asserting that they will "rely largely" on the facts found by the district court, except to refer to facts about which they believe there is no dispute. (Br. 11-12), the writers ignore some basic findings, directly attack others and proceed as though they had not been made, and base arguments on assumptions of fact nowhere to be found in this record. By rearrangement, or quotations of only part of findings, and constant repetition of findings out of context, the writers of the Government brief attempt to portray a situation not disclosed by the record or found by the court.

The brief as a whole reflects a determination to wreck the defendants and the industry regardless of any other consequences. The brief subordinates everything else in favor of a fixation for stripping defendants of their theatre interests and destroying their value in the course of that major surgical operation.

An attack is made (Br. 119-125) upon the court's conclusion and finding that divestiture would serve no useful purpose (R. 3559) and would, in fact, be injurious to the public as well as to the defendants (R. 3551, 3554-5). This attack is based upon the erroneous premise that the court thought theatre ownership was an evil but that the cure would be worse for the public and the defendants than the disease. But it is plain that this was not the rationale of the court's refusal to direct complete divestiture. The court had found that the supposed injury to the public came from the effect of trade practices in distribution which it ordered enjoined, and not from theatre ownership by defendants, and it pointed out clearly that divestiture would not remedy or alleviate the situation which it supposed was created by the existence and continuation of those distribution practices, but would leave the public, as well as the defendants, at the mercy of powerful independent circuits or of distributors controlling most of the best pictures and not competing in distribution (R. 3554-5). Thus the basis of the court's denial of the extreme relief sought by the Government was quite different from that upon which the present attack on its action seems to be predicated.

The court's conclusions are clearly sound in the light of past events. The inability of Paramount to market its films in the face of the powerful First National combine was al-

leged in the complaint (R. 3167) and found by the court (R. 3661-2). The proclivities of large independent circuits to monopolize and restrain competition by their smaller competitors was noted (R. 3555), and the correct conclusion was reached that divestiture and divorcement would only remove defendants (found to have been skilled operators of the best equipped theatres), from competition (R. 3551) which they had created and maintained by their entry into the field of exhibition (R. 3661-2; Findings 20 and 23, R. 3664).

It is said, in an attempt to answer the court's conclusion, that there was nothing in the record to suggest that independent interests could not give the public as good service as the defendants, (Br. 120), and, of course, they can, and we do not urge the contrary, but defendants are not to be deprived of lawful property interests merely because someone else wishes to and is qualified to own them. The other provisions of the decree assure that no qualified independent operator will be deprived of films; it should not also insulate him from competition from defendants with its resulting benefits to the public.

The findings are that there are nearly fifteen thousand independently operated theatres, and that they have increased in number more rapidly than affiliated theatres have (Finding 145, R. 3668); that independents actively compete in all places where a defendant operates except in a relatively few towns where all the theatres are affiliated (Findings 146-150, R. 3688-9), and that in those few situations, there was nothing inherent in theatre ownership by a defendant which prevented independent theatres from operating, and that the proof did not show that those situations had been brought about or maintained by wrongful action on the part of defendants (Finding 153, R. 3690).

The paradox which the Government sees in the court's conclusion (Br. 121-2) is unreal. The argument rests on the premise, held to be erroneous, that the distribution practices enjoined by the decree flow from the integration of distribution with exhibition, and that they cannot be eliminated except by wholesale punitive and confiscatory disintegration. The court, on substantial evidence, found to the contrary, and held that these practices did not flow from integration, (Findings 154-156, R. 3690). This premising of argument upon factual contentions found erroneous below hardly comports with a claim that the writers have accepted evidentiary findings and rely only on undisputed facts.

An attempt to create a prejudicial setting is made by the Government in its argument that experience, as purportedly shown by past litigation, shows that "No judgment which merely regulates defendants' trade practices can give adequate relief" (Br. 72-89). Aside from the obvious impropriety of attempting to lead this Court to determine issues framed by this record upon opinions based on entirely different records,* even the past cases and the administrative rulings referred to in the Government's brief (which by no means represent a fair cross-section of past cases) do not add up to the desired conclusion—that the restraints found in some of those cases are inherent in ownership of theatres by these defendants, whether their holdings be considered individually or in the aggregate, and therefore that this Court should disregard the findings below and conclude that the courts cannot give

*Mackey* v. *Easton*, 86 U. S. 619 (1873); *Ball* v. *Paramount Pictures, Inc.*, 67 F. Supp. 1 (W. D. Pa. 1946).

effective relief without divorcement. Indeed the argument suggests an almost unprecedented departure from proper conceptions of due process.

The Government's argument here, as in most of its brief, depends upon the assumption that the defendants' businesses can be aggregated, which the court below has expressly held cannot be done (R. 3553). In spite of its failure of proof justifying a contrary conclusion, the Government seeks to accomplish and justify aggregation by showing the licensing of some of each defendant's pictures for exhibition in some of the theatres of the other defendants, (which the Government erroneously calls "cross-licensing"), and the joint operation in the past of some theatres by two defendants, i.e., the few "pools". But the Government fails to show why, if these circumstances have led to abuses, a decree enjoining the abuses would not be all that is necessary, and why the only remedy appropriate for a court of equity is to destroy the ability of able competitors to compete, by permanently enjoining them from the exhibition field and making it impossible for them to operate pending forced sales of their present holdings. The Government concedes—indeed openly declares—the fact that the relief asked, of a ban on licensing between defendants, would result in forced sales of some theatres (Br. 131-2). Such relief is concededly without precedent (Br. 132-3) and is clearly of a punitive, and, in fact, vindictive nature.*

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*"Pools" between defendants are, of course, effectively banned by the decree. Their existence in the past cannot form a basis for divestiture of *all* theatre holdings, and there appears to be no valid basis for a claim that the injunction granted against them is not adequate.

Since nothing in the findings or record warrants either the interim or final relief demanded, the Government resorts to an unrepresentative sampling of past cases against the industry in an attempt to justify it. But even if those cases in fact showed a past proclivity to violate the law, in certain particulars, which could properly be considered here, and past ineffective attempts to dispel the proclivity (which they do not, as we shall demonstrate), this Court will, of course, act only upon the proof before it, and not act on suspicion or facts found in other cases, and it will consider relief accordingly without prejudice and without undue injury, permitting the defendants to live under the law of the land. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386; 324 U. S. 570 (1945); *U. S.* v. *Bausch & Lomb Co.,* 321 U. S. 707 (1944).

## Comments Upon the Government's Statement of Purported Facts

Under the heading "The theatre acquisitions of the five major defendants" (Br. 14), the Government states that in 1919 Paramount decided to acquire theatres of its own so that it might assure itself of outlets for Paramount productions. Later the Government urges that these acquisitions were "in order to have non-competitive market outlets for their films" (Br. 91). Such statements and conclusions are a distortion of the findings and ignore undisputed evidence in the record. As we have pointed out, at pages 22 to 24, *supra,* Paramount's initial acquisitions were competitive measures and were entirely lawful in purpose. We do not attempt to justify them on the ground that the members of the First National combine were violating the Anti-Trust Laws, as the Government suggests (Br. 103-4),

and they were not in any way analogous to the "deliberate, calculated purchase for control" condemned in the *Reading* cases and the *Yellow Cab* case (Br. 104).* They constituted a legitimate and lawful method of enabling Paramount to sell its products when potential customers, lawfully or unlawfully, refused to buy them, and the exercise of the right to go into a business open to all. Since the initial acquisitions, Paramount or its subsdiaries have built new theatres, thus creating markets where none before existed, and Paramount has not confined itself to the acquisition of existing theatres or circuits (R. 608; Exs. P. 25 and P. 25A).

The omission of the actual facts disclosed by this record cannot serve to strengthen the current Government argument that integration in this industry is unlawful because it enables a defendant to monopolize and restrain trade in that alleged segment of business represented by its own copyrighted pictures (Br. 90 *et seq.*). We will expose the fallacy of this contention at a later point. When all of the facts are considered, the emptiness of the argument appears clear.

Again under the heading "Geographical Pattern of the Major Defendants' Theatre Holdings" (Br. 15-17), the Government seeks to create the impression that the defendants have agreed not to compete with each other in exhibition, except possibly in some forty-seven cities, most of which have populations of 100,000 or more, and that even in those cities the defendants who "nominally" compete

*Anyone who purchases property does so with the intent to control it, but that does not make him a law-breaker. There was no showing that Paramount had any intent or power to exclude competitors, as in the cases which the Government cites.

in theatre operations do not compete with each other in the licensing of films (Br. 17-19). The facts do not support the claim.

The undisputed testimony establishes that there were no agreements among defendants to divide territory or not to compete generally with each other in exhibition (R. 608, 1601, 1826); and the court below failed to find any such agreements. Nor was there any evidence of, nor is there in fact, any "pattern" of theatre holdings, geographical or otherwise. Some theatres or circuits were acquired by one defendant in competition with another (R. 607-8, 937-40, 2041-2). Some theatres formerly owned by one defendant were acquired by another in the former's bankruptcy proceedings (R. 2090).

There was no proof that cities and towns, where one or more of the defendants had theatres, were capable of supporting more theatres or more theatres capable of operating as first run theatres. The Government makes a point of the fact that the downtown theatrical districts in large cities are already well supplied with theatres (Br. 63, 103).

Different policies governing the theatre operations of each defendant explain in good measure why they are not all found in the same places. Loew's, for example, apparently likes to operate a large theatre in a limited number of large cities. It started as an exhibitor after converting its existing large vaudeville houses into motion picture theatres when the vaudeville entertainment they were supplying lost its public appeal, and it thereafter acquired a production and distribution business competing with Paramount and others. Paramount, on the other hand, believes in operating in smaller places as well. It is not strange, therefore, that Loew's is not found in more places in competition with

Paramount. Warner acquired many of its theatres through acquisition of an existing localized circuit (as of course some others did also). Warner, having no policy of general expansion, it is not strange that it, (or any defendant), is not found in competition with other defendants in places remote from its main operations where another defendant by a prior acquisition had obtained theatres.

RKO's predecessor, like Loew's, already had theatres in certain cities in which it was offering vaudeville which were converted for the exhibition of pictures, and the formation of RKO and its acquisition of production and distribution facilities created new competition for Paramount and others in all branches of the industry (Findings 20, 23, R. 3664).

Fox, in some cases, likewise acquired theatres already in existence in certain cities, sometimes in competition with Paramount or other defendants, who, when defeated by Fox in their efforts to acquire the circuit, were able to get other theatres in other cities. These circumstances account for the present geographical locations of many of defendants' theatres.

The facts show that Paramount competes in exhibition with one or more of the defendants in at least forty-five cities, and there was a complete lack of proof that it had agreed with anyone to stay out of a single town or area where another defendant operated.

The Government's comment that expansion by defendants has been subject to control by their respective home offices (Br. 17), if intended to raise a suspicion that there were agreements, is not substantiated by the proof. In Paramount's case that "control" was only the result of the fact that Paramount, as a stockholder in a subsidiary, re-

quired that it be consulted when the subsidiary desired to make a substantial capital expenditure such as, but not being limited to, the acquisition of a new theatre (R. 829, 886). Such a requirement is only a normal and prudent one to protect an investment. There was positive testimony that there were no agreements between defendants to stay out of areas where another defendant had theatres (R. 608, 1601, 1826). This case shows a pattern of such diversity as to be completely inconsistent with any claim of pattern or agreement with respect to theatre locations.

In support of its argument that the defendants, when operating in the same city, do not compete with each other for products (Br. 17-19), the Government asserts that in the ninety-two cities of more than 100,000 population, during the period 1937-1944 the product of the defendant distributors "continued to flow" to the defendant exhibitors with virtually no shift from one to the other, and it is asserted that defendants offered no evidence to prove such competition (Br. 19). Here again, by not disclosing the complete facts, the Government seeks to draw unwarranted inferences of agreements not to compete in licensing films. It ignores for example the finding by the court, amply supported, that in some cases Paramount theatres, though desirous of doing so, were unable to get licenses to exhibit another defendant's pictures, because they were licensed to competitors of the Paramount theatres (Finding 129, R. 3686). In some cases, the competitor was another defendant which had succeeded in licensing the desired product.

In a limited number of cases where two or more defendants have theatres, each theatre is able to fill its screen time with only its own or its parent company's pictures, and there is no occasion for it to compete for those of other distrib-

utors. In other places, the theatres can get along with a few other pictures or the products of one other distributor. The success of that one distributor in licensing its pictures to such a theatre necessarily excludes other distributors from doing so to the extent that the needs of the theatre are satisfied. The other distributors, as a result of the first one's successful competition for the available screen time of the theatre, naturally seek and obtain another licensee, who may or may not be one of the defendants. "Switches" thereafter do not occur frequently, simply because the circumstances which cause the original selection of licensee or product do not change frequently.

The Government's argument also ignores the findings that the defendant distributors, other than Loew's, in twenty-one out of the thirty-six large cities where Loew's operates theatres, licensed their pictures to competitors of the Loew's theatre, and that over the years they have licensed less and less products to the Loew's theatres (Findings 131-2, R. 3686). It ignores the findings and proof as to the great fluctuations year to year in the amount of film rentals paid by the theatres of one defendant to each of the other defendants, indicating variations in number of pictures licensed (Findings 134-44, R. 3686-8).*

Furthermore, if in some places there was little or no shifting of product from one defendant's theatre to an-

*It is true that where defendant has a theatre, it usually exhibits its pictures there first, and to that extent does not put those pictures on the market for competing exhibitors until it has run the picture in its own theatres or decided not to do so, and this is all that the witness Rodgers was referring to when he testified, (R. 572, Government Brief 18-19), that defendants did not compete for the licensing of Loew's products. It cannot be blown up into a concession of a general lack of competition as the Government's brief attempts to do.

other defendant's theatre, that fact alone is not indicative of anything unlawful, and certainly is no proof of a general conspiracy among defendants to obtain a monopoly for one or all. There was no showing, for example, that conditions had changed in any of those cities so as to make a Paramount theatre dissatisfied with the product of Loew's, and desire to replace it with Warner product and, therefore, to induce the Paramount theatre to compete against an RKO theatre for that product. Many reasons more consistent with legitimate business considerations than unlawful conspiracy suggest themselves and appear in the record as to why theatres, whether affiliated or not, continue to show the pictures of the same producers rather than to change producers frequently and constantly. And there are equally valid reasons why a distributor does not try to "peddle" its product, but prefers a more steady customer (R. 735-6, 823, 1391, 1701). Theatres, whether affiliated or not, need a steady flow of product, and naturally can be assured of such a steady flow better by continuing to deal with a given distributor than by shopping around among all.

Clearly there is no law which brands unlawful *per se* normal continuance of business relations between a buyer and seller or a principal and agent, and the fact that these relations continue is not a suspicious circumstance justifying an inference of unlawful agreement. An illustration makes the matter clearer. Suppose exhibitor A for years has had satisfactory results from playing the pictures of distributors X and Y. These pictures supply A with enough product to operate his theatre. He does not need more pictures and he cannot do with less. His competitors, exhibitors B and C, need and deal for the product of the

remaining distributing companies and succeed in obtaining their respective needs. They likewise need no more pictures and cannot do with less. If A should then also license the product of one of the distributors theretofore supplying B or C, he would have available more pictures than he could use, and his competitors, B and C, or one of them, would have less than needed and would be forced to attempt to get a product away from A. With this prospect in mind, A concludes that he would not benefit from trying to acquire products other than those distributed by X and Y, and is therefore content to deal with those distributors and not raid the suppliers of B and C. Distributors X and Y, on the other hand, enjoying satisfactory business relations with A, are content to deal with him so long as he continues to have a good theatre, pay reasonable license fees and meet his obligations. There is no reason in business, law or morals to expect that there would be frequent changes under these circumstances and that exhibitors A, B or C or the distributors would seek to create destructive competition in such circumstances. The Sherman Act does not compel competition—it only outlaws unreasonable restraints of it. *U. S. v. United States Steel Corporation*, 251 U. S. 417, 451 (1920). Neither independent operators nor these defendants as exhibitors are required by the Sherman Act to disregard normal self-interest.

The fact that Ford sells its cars to or through the same distributor from year to year and may not offer distributorships to competing distributors frequently, or the fact that General Motors may not try to solicit Ford's dealers to give up selling its cars in favor of those of General Motors, are not circumstances which require an inference of an agreement between Ford and General Motors not to compete, or

of an agreement between the dealers to divide the market rather than to compete for a product to sell. Nor does the fact that a retailer of Firestone and Goodrich tires continues as such, and does not frequently give up those brands or try to take the product of Goodyear away from his neighbor, mean that he and his neighbor have agreed not to compete in obtaining products to sell. There is no more reason on this record for construing any absence of shifts of product between defendants' theatres as itself indicative of conspiracy, than in the above illustrations.

Furthermore, if and to the extent that normal shifts have been impeded by long-term contracts or by master agreements, these impediments will be removed by the injunctions in the decree against the making of franchises and master agreements, from which we do not appeal.

Under the heading "The Defendants' Position in the Industry" (Br. 19-22), the Government gives statistics intended to show the aggregate theatre holdings of the separate defendants and the aggregate license fees received by all of them as distributors. Aggregation is resorted to because it has been necessary for the Government to concede that if each defendant is considered individually, the statistics are not significant. They are clearly irrelevant in the absence of some legal justification for treating defendants as one theatre operating combination. The defendants collectively have no "position" in the industry—each has its own position and strives to better it. The Government conceded below that "1. Individually considered, each distributor defendant directly controls only a fraction of the entire domestic distribution business" and "2. Individually considered, each producer-exhibitor directly controls only a fraction of the entire domestic exhibition

business * * *." (Government's Trial Brief, p. 2). In the absence of evidence and finding of some vast national agreement not to compete in the licensing of products, a conclusion that there was one rests solely on inference from the bare fact that one defendant distributor over a given period of time has licensed its product to a certain exhibitor defendant and not to another defendant operating a theatre in the same city, an inference which was for the trial court and which it refused to draw. The inference cannot be drawn here since many lawful considerations are at least equally probable and the Government failed to sustain its burden of proof. *Schad* v. *Twentieth Century-Fox Film Corporation*, 136 F. (2d) 991, (CCA 3, 1943); *Pennsylvania Railroad Co.* v. *Chamberlin*, 288 U. S. 333, 339 (1933).

Since there is no proper basis for treating defendants in the aggregate, the statistics as to their aggregate theatre holdings and aggregate film rentals are mere exercises in arithmetic. When Paramount's individual business is examined, its "position" in the industry presents an entirely different picture.* It owns interests in only about 1550 theatres or about 9% of those in operation. Those theatres pay no more than 11% of the total domestic film rental received by each of the 7 distributor defendants other than Paramount, and no more than 16.8% of such film rental received by all (Ex. 425). Its theatre holdings are not confined to large cities of the United States, but it has theatres in smaller places as well, and its theatres are the only ones supplying motion picture entertainment to the inhabitants of some of those smaller places. It has first run theatres

*Compare its present position with the allegation that in 1916 it was the dominating influence in the industry (Compl. par. 97, R. 3167).

in only 47 of the 92 cities with populations of over 100,000, and it owns interests in all of the currently operating first-run theatres in only 11 of those cities.* It has no monopoly or "virtual monopoly" of first run theatres in the legal sense in any of these cities, as the court below found (Finding 153, R. 3690) and has competitors in all of these cities. It has theatre interests in only 139 of the 320 cities with populations of 25,000 to 100,000. It has no monopoly in the legal sense of the exhibition business in any of the towns where it has the only theatre or theatres. As the court below pointed out, unlawful monopolization cannot be shown merely by proof of ownership of the only theatre or store in a town (R. 3554, 3556).**

Paramount annually distributes not more than about 9% of the features distributed in the aggregate by the 8

*The term "first-run theatre" is really a misnomer. Any theatre obtaining a license for the first showing of any picture in any competitive area is a "first-run theatre" as to that picture in that area (R. 23). As a convenient descriptive phrase, however, it generally denotes the best theatre in an area. Paramount theatres are generally the best or comparable to the best in their respective areas (R. 751, 869, 1926, Exs. P-24 and P-24A) and distributors license them for the first showing of their pictures because of that fact and not because they belong to Paramount (R. 1514, 1699, 1973, 2043). Similarly, Paramount as a distributor attempts to license the first showing of its pictures to the best theatres regardless of who owns them (R. 763), although sometimes where Paramount has no theatre it is not successful because its distributor competitors have succeeded in filling the needs of the best theatres (R. 704-5, 753).

**See *United States* v. *Pullman Co.*, 64 F. Supp. 108, 112 (E. D. Pa. 1945) where it was said "If there is only one store in the town at which everyone trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by the devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

defendants and 3 of the other national distributors, Republic, Monogram and PRC (Finding 99, R. 3677). It receives no more than 15.6% of the annual film licensing revenue paid to the 8 defendants distributors and, of course, a much smaller percentage of the film revenue received by all distributors.

Statistics for the other defendants, individually, will undoubtedly be found in their separate briefs, and will indicate, as do the above, that the statistics used by the Government, when properly viewed, show the absence of monopoly or the ability to monopolize in any of the defendants. The trial court's findings, that there is no basis for treating the defendant's separate businesses as one, require that the elaborate statistics put together on an opposite basis be treated as irrelevant. *Maple Flooring Association* v. *United States*, 268 U. S. 563, 577 (1925).

Under the heading "The Conspiracy to Fix Prices, Clearances, and Runs" (Br. 22-29), we find the Government seeking to convert the actual agreements found below into agreements justifying aggregation of the defendants contrary to the interpretation of those findings by the court which made them. Here the Government sets out the findings of the lower court with respect to the licensing practices pursuant to which films have been licensed to *all theatres*, whether affiliated or not, and the findings that in general the runs and clearances granted, and the minimum admission prices inserted in the licenses of all the defendants individually with *all* their licensees, have been substantially similar. From this similarity the court below inferred a conspiracy between the defendant distributors and *all* of their licensees, independent and defendants, to maintain a fixed system of runs, clearances and

minimum admission prices. The Government asserts (Br. 24) that "this conspiracy has been effectuated mainly by means of film-licensing agreements between all eight defendants as distributors and the five major defendants as exhibitors" (Citing Finding 64 at R. 3670). But that finding does not support the statement. It is a general finding that the defendants' licenses are in effect price-fixing arrangements among *all* of the distributor defendants as well as between the distributor defendants individually and *all* their various exhibitors, and that they show a general price fixing arrangement in which both the distributors and *all* their licensees were involved.* The finding shows on its face that it has nothing to do with the ownership or operation of theatres by the defendant distributors, and there is no justification in the record for treating the erroneous conclusion of conspiracy based only on similarity of licensing practices used by *all* distributors with *all* exhibitors, as stemming from theatre ownership by defendants. The court found to the contrary (Finding 154, R. 3690), and the Government points to no evidence to justify disregard of that finding. Continued repetition of the simple fact that in many instances each of the five major defendants as an exhibitor has been licensed by other defendants as distributor under license agreements providing for runs, clearance and minimum admission prices cannot serve to change the character of the conspiracy as found or obscure its application to *all* situations. The findings show that these practices have been followed by *all* distributors, whether defendants or not, with *all* licensees whether affiliated or not, and there is no basis to conclude that the

*Of course, the number of licenses which Paramount (and other defendants as well) makes with independents far outnumber those which it makes with defendants' theatres (R. 668, 1072, 1266, 1416).

conspiracy was effectuated mainly by the licenses of one defendant to another defendant's theatres, or that ownership of theatres by defendants was its root. And, if the licenses contain matters which are objectionable, or their terms are imposed by unlawful conspiracy, the remedy is by injunction against all who participated, not amputation of some upon a complete misdiagnosis of the ailment.

Reciting findings out of context in an effort to develop its thesis, the Government finally arrives at its conclusion, entirely synthetic, that the "obvious purpose and effect of this system was to increase the profits of the major defendants, both as distributors and exhibitors and to produce greater profits for the non-exhibitor defendants in their capacity as distributors" (Br. 26). Of course, there is nothing heinous in the pursuit by an American business concern of a policy which has the purpose and effect of increasing its profits. It is unlawful only if an illegal agreement or combination is involved or the motive or effect is to monopolize.

The evidence shows that the licensing practices were designed and followed by *all* distributors to enhance their revenue and adopted by *all* exhibitors, whether affiliated or independent, to further their respective businesses. Legitimate self-interest of all members of the industry induced the practices prior to and regardless of integration by defendants (R. 423, 439-40, 665, 705, 717, 916-8, 934, 1080-1, 1269, 1506, 1904).* Accordingly, relief (if appropriate

*The Government fails in its attempt to show that the supposed conspiracy to fix runs, clearances and minimum admission prices which were substantially uniform in each competitive area originated only after integration (Br. 28-9). The proof showed that these practices originated with the feature picture before even Paramount acquired theatres (R. 423, 439-40, 665, 705, 717, 916-8, 934, 1080-1, 1269, 1506, 1904). They, of course,

at all) was properly addressed to the practices and it would have been an abuse of discretion to strike at unrelated lawful activities.

If it is unlawful for a distributor to stipulate minimum admission prices in areas where it operates theatres for the purpose of safe-guarding the box office receipts of these theatres, or if the distributors have conspired to fix prices or otherwise unreasonably restrained competition they should be enjoined, but they should not be dismembered.

The Government relies heavily upon Finding 72 (R. 3672-3) to the effect that admission price differentials between runs in competitive areas heretofore prevailing in licenses were calculated to encourage as many patrons as possible to see pictures at the higher priced first-run theatres, and that in effect the distributors, in fixing minimum prices, attempt to give the prior run exhibitors as near a monopoly of the patronage as possible (Br. 26-27). But if such a view of motive be accepted, this record shows that the attempt never approaches success, nor is it expected to.

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existed long before Twentieth Century-Fox acquired theatres in 1925 and before Warner and RKO did so in 1926 and 1928 respectively. To the extent that the current licenses evidence a "steadily increasing control by the distributor over the exhibitor's business" (Br. 28), the statement, if true, is not shown to be due to integration. One would suppose, on the contrary, that the defendant exhibitors, if obsessed with the motives which the Government ascribes to them, would have seen to it that those controls would be relaxed, not extended, and, the evidence shows that *all* distributors limit their licenses to all theatres whether they belong to a distributor or not (R. 697, 707, 715, 1483, 1506). Similarity in detail in the contracts is accounted for by the fact that a more or less standard form of contract was evolved at the request of independent exhibitors, and when NRA was functioning, which has been continued by the individual distributors with variations since these times (R. 923, 925, 927, 929, 931).

The fact is that the minimum admission price provisions have not been confined to subsequent licenses; these provisions have also been inserted in the licenses of all prior runs (affiliated or not) in order to protect the value of the subsequent run (affiliated or not), and to protect his patronage in the lower priced theatre.* Thus the conception of motive contained in Finding 72 is more extreme than the facts warrant. Price differentials likewise reflect the depreciated value of the picture resulting from its prior exhibition, and the lower price is the inducement used by the subsequent run operator to attract patronage to his theatre. If, contrary to the uncontradicted evidence that the price is the theatre's normal price at the time (Finding 63, R. 3670), it can properly be said that the distributor fixes the price, and if it can be said that it does so to attract patronage to the theatre, then logically it should be said that the distributor fixes the differentials and the lower prices in subsequent run theatres in order to attract patronage away from the higher priced earlier run theatres. The plain fact is that the distributor's revenue depends on exhibition in as

*The Government's position with respect to minimum admission prices is subject to wide variations. In *United States* v. *Schine Chain Theatres, Inc.* (No. 10 this Term), in discussing the run clearance and minimum admission terms and licenses, Government counsel said "That is it [a distributor] will fix a run and give a clearance protection and provide admission prices which will to a great extent directly determine the terms on which the film can be played by the competitor. And, as I say, each contract that is made, of course, does restrain competition in that sense. Now, we do not here attack those restraints as such. Whatever may have been the position originally this method of licensing films through clearance and minimum admission prices has been established in the industry and it is the way in which the industry operates and so long as those restraints are reasonable, as far as we are concerned, there clearly is no conflict with the Sherman Act." (*Schine* Record, 493-94).

many theatres as possible, on as many runs as possible and to as many theatre patrons as possible. There is little room for inferring a motive to monopolize in such a projected market. It is well known that the greater the business done by a picture on earlier runs the better it does on subsequent ones (R. 817-8; 1387-8). In the light of the foregoing, Finding 72, if true, is only a half-truth, and cannot have any of the sinister implications which the Government sees in it.

At page 27 of its brief the Government concludes that "as a result of the control over both distribution and exhibition exercised by the defendants the conspiracy has been so successful * * *" that exhibitors and distributors have been met by a fixed scale of clearances, runs and admission prices, if they wish to get their pictures shown upon satisfactory runs or were to compete in exhibition (citing Finding 84, R. 3674). But that Finding shows that the situation which the court supposed existed, had nothing to do with ownership of theatres by defendants. The "fixed scale" was found to exist throughout the industry, and the supposed effect was upon competition by *all* distributors and exhibitors to compete with *all* of defendants licensees, or to get their pictures shown in theatres of *all* licensees, whether affiliated or not. Citation of Finding 84 to support the Government's conclusion is misleading, and to accept the conclusion requires the ignoring of Finding 154 (R. 3690) that the illegalities and restraints found by the court were not due to ownership of theatres by the defendants, but were in the trade practices and pooling agreements, and the court's conclusion in its opinion that outside of the trade practices and agreements which it thought violated the anti-trust laws and which it abolished by the decree, there was competition among the defendants and between them and

independents for the exhibition of their pictures (R. 3554). These views as to the wide areas of competition and the narrow areas of restraint ought not to be disregarded in appraising so complicated an industry.

Under the heading "Theatre Pooling Arrangements" (Br. 29-31), the Government, unjustifiably assimilates partial ownership of theatres with pools and percentage leases, and treats them all as "pools of theatres which otherwise would be independent". The two types of relationship are easily distinguishable, and, as we have shown in Point I *supra*, they merit separate treatment. There is certainly a difference between an agreement between two competitors for the joint operation and sharing of profits of separately owned theatres in the same competitive area, and the ownership of stock in a company owning, leasing or operating theatres in several places in which no competitor is involved. As we have shown in Point I *supra*, neither the Government in its proof nor the court considered the facts in any of the partial ownership situations. The Government did not assert that they had the effect which a pooling by competitors of competing theatres had on competition between the parties, to fix prices, etc., upon which the court found and concluded that pools were unlawful (Finding 112, R. 3682; Conclusion 9(a), R. 3693). In Point I *supra*, we have adequately demonstrated that the court's disposition of partial interests, virtually without giving us an opportunity to be heard, was erroneous and the Government's reliance on that portion of the decision is, therefore, misplaced.

At pages 31 to 34 of its brief the Government refers to other trade practices such as "block-booking," "blind selling," master agreements, formula deals and franchises, and to certain discriminations in licenses between small the-

atre operators and large ones, affiliated and independent. Their use bears no relationship to theatre ownership by defendants. Furthermore, master agreements, franchises, formula deals and unlawful discriminations are adequately eliminated by the decree. "Block booking" and "blind selling" are simply bogeys disposed of in the briefs of other defendants.

### The Government's Reliance Upon Earlier Litigation Concerning the Industry

About 13% of the Government's brief is consumed by a dissertation on a few selected cases brought against defendants in this industry under the anti-trust laws, and a statement with respect to prior administrative attempts under the NRA and under the Consent Decree to regulate industry practices (Br. 72-90). There is no claim that the decrees in these suits were not followed to the letter, except perhaps for the recitation of the contempt proceedings brought in Chicago in the Balaban & Katz matter, but there, as the footnote at page 79 of the brief shows, the violation of the consent decree ultimately found by the Master was of "a general provision against monopolization in the terms of Section 2 of the Sherman Act" and "none of the defendants were found guilty of violating the more specific provisions of the decree * * *". The Government neglects to add that the pleas of *nolo* to dispose of the matter were made as part of the agreement resulting in Consent Decree of November 19, 1940 in the present case (R. 2763-4).

These earlier cases are apparently relied upon by the Government as showing their ineffectiveness to prevent *all* law violations. Of course, if a court could (and would) depart far enough from the normal judicial function as to

make a decree which would thereafter prevent all law violations by the members of an industry so that the industry would be entirely governed by the court on citations for contempt, we might have a more simple form of government—certainly it would be a different one. But that is not our system, and courts properly limit themselves to dealing with issues tendered by pleadings and competent evidence presented to them. The suits brought by the Government against local circuits (West Coast Theatres, Inc. and Balaban & Katz Corporation, (Br. 78-9)) involved local issues (R. 5). There is no evidence that the decrees were ineffective, and the Government was satisfied in 1940 to have them amended to conform to the Consent Decree in this case (R. 2763-4).

In the two suits brought in 1928 (Br. 79-80), the Government chose to present very narrow issues as to the legality of contract terms (R. 5) concededly adopted openly by the distributors by agreement in an effort to find ways to prevent fraud against distributors (*United States* v. *First National Pictures Inc.*, 282 U. S. 44) and to provide fair and inexpensive methods of determining disputes by arbitration. (*Paramount Famous Lasky Corporation* v. *United States*, 282 U. S. 30.) The distributors were held to have violated the law because of their joint action, but the courts did not condemn their motives. In fact the Court conceded that the purpose and the effect was to benefit the industry, but held the joint action made them unlawful. There is no suggestion that the decrees were not honored or that they were ineffective to accomplish what the Government asked for. They have no bearing on any issue involved in this appeal or to the relief that the Government is here demanding.

The *Youngclaus* case discloses nothing sinister. It involved an effort to reduce clearances by formulating a

uniform maximum clearance scale which was openly arrived at by a Film Board of Trade and adopted by the distributors and all exhibitors in the area except Youngclaus, in the belief that their action was lawful. When it was discovered that they were in error, that ended the matter, and the Government's possible preference for the pre-Youngclaus clearances over those granted individually by the distributors at the time of this trial is hardly significant. There is no finding here that any of those particular clearances were unlawful.

The *Interstate* case presented another narrow local issue of a violation of Section 1 of the Sherman Act. The situation disclosed by the record was an unusual one as this Court noted in its opinion (306 U. S. 208, 222). The decree terminated the practices to which the Government had confined its complaint, and this Court could hardly be criticized for not providing a universal nostrum.

The Government's suggestion that Paramount disregarded a part of the Federal Trade Commission order in 1927 is unfounded. The Commission apparently felt so unsure of its grounds with respect to Paramount's theatre acquisitions that it decided not to attempt to make its order effective and, therefore, did not ask the Circuit Court for the necessary enforcement order.* The Government's quotation from the opinion of the Circuit Court of Appeals at page 75 of its brief is completely out of context. The court was referring only to block booking in combination among distributors and was not discussing anything else. It expressly found that Paramount had not combined with others to do the things charged as unlawful.

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*At that time orders of the Commission were not effective unless it obtained an enforcement order from the court. Now, of course, its orders are effective unless set aside by the Circuit Court of Appeals. The Federal Trade Commission Act was amended by the Walter-Lea Act (52 Stat. 111) in 1938.

The complaint that the NRA Code was only partially successful in mitigating discrimination (Br. 85-7) is not based on any evidence in the record, and we would have supposed that the place to meet that ghost, if anywhere, was on the record. It apparently rests on hearsay information of writers for the Government, many of whose statements of fact were gleaned from the complaint in this suit prior to a trial of the issues.* The court found that arbitration under the Consent Decree was of real benefit to this complex industry and recommended its continuance (R. 3558, 3702).

Finally, the Government cites three private damage suits won by theatre operators (Br. 87-8). It seems clear that these suits are no more relevant to the questions presented here than would be an exposition by us of the numerous private anti-trust suits which have been won by the defendant distributors and exhibitors.** In every such suit the questions of conspiracy and monopolistic action have been closely contested, and the triers of the facts have sometimes resolved the questions against defendants and sometimes in their favor. Here the court below has, from similarities, inferred conspiracy to fix runs, clearances and minimum admission prices, and has found that partial ownerships of theatres restrained competition between the co-owners. We think both conclusions are wrong, but we are here simply pointing out that defendants should be judged upon this

*See, for example, the reliance of the T. N. E. C. Monograph 43 (Br. 16) on the amended complaint in this action.

**Equally irrelevant would be reliance upon suits won by a distributor against unlawful conduct of a large number of exhibitors who combine to boycott its films to force the distributor to grant them concessions, such as in *Paramount Pictures Inc.* v. *United Motion Picture Theatre Owners*, 93 F. (2d) 714, (C. C. A. 3, 1937).

record and not upon another one. Past history indicates that defendants will win a fair share of the pending suits referred to in the footnote at page 72 of the Government's brief—the mere pendency of these suits cannot be taken as proof of guilt demanding that the defendants be barred from the exhibition business.*

The statement at pages 37 to 38 of the Government's brief that the court "said nothing concerning the Government's claim of a collective distribution monopoly, or its contention that each vertically integrated combination between a major distributor and its theatres violated both Sections 1 and 2," (of the Sherman Act), is hardly fair. The fact is that the court refused to hold that there was any distribution or exhibition monopoly, individual or collective, as the Government recognizes, (Br. 11), and held that outside of the trade practices which it thought were illegal there was competition in distribution (R. 1554). The court had no occasion to consider and reject the argument now made as to why the Government now urges that integration is unlawful for its present argument is made here for the first time. It was conceded that a distributor had the right

*Some of the private anti-trust cases successfully defended by one or more of the defendants are as follows: *Westway Theatres, Inc.* v. *Twentieth Century-Fox Film Corporation*, 30 F. Supp. 830, 113 F. (2d) 932; *Rembusch* v. *MPPDA, Inc.*; D. C. N. Y.; *Quittner* v. *MPPDA*, D. C. N. Y.; *Colonial Theatrical Enterprises, Inc.* v. *Cooperative Theatres of Michigan, Inc.*, E. D. Mich.; *Frels* v. *Jefferson Amusement Company, et al.*, D. C. Tex.; *Gary Theatre Co.* v. *Columbia*, D. C. N. D. Ill.; *E. M. Loew's* v. *Twentieth Century-Fox Film, et al.*, D. C. Mass.; *Miami Drive In* v. *Loew's*, D. C. Mass.; *Winchester Theatre Co.* v. *Twentieth Century-Fox, et al.*, D. C. Mass.; *Schad* v. *Twentieth Century-Fox*, D. C. Pa.; *Ball* v. *Paramount Pictures Inc.*, 67 F. Supp. 1 (W. D. Pa., 1946); *Schubert* v. *Metro*, D. C. Minn. There are many others.

to show its own pictures (R. 1945) and it was not asserted that licensing films to or exhibiting them in a wholly or partially owned theatre necessarily resulted in a continuing restraint and monopolization with respect to "that important segment of trade represented by the pictures it distributes to its own treatres" (Br. 90-1).

A change of the forum and of the lance-bearers has brought a change in front, and we now find ideas advanced for the first time which were not presented, and perhaps not even shared, by the counsel who prepared the case before 1938, lived with it in the interim and presented it to the court in 1945. We will now discuss the new theory that ownership of a place to exhibit his picture is *per se* a violation of Sections 1 and 2 of the Sherman Act because it enables the owner of property or the holder of a monopoly guaranteed by a statute designed to carry out a mandate of the Constitution (the Copyright Law) to *restrain competition in and to monopolize his own property*, and that therefore the court should have ordered ultimate divorcement (Br. 90 *et seq.*).*

**The Government's Theory That Each Integrated Company Constitutes an Unlawful Restraint and a Monopolization of the Pictures it Exhibits in or Licenses to its Own Theatres**

The Government rests this novel proposition on the following statements (Br. 90-1):

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*Paramount's position with respect to the mandate of Section II(8) of the Decree enjoining any method of licensing except by the so-called competitive bidding system devised *sua sponte* by the trial court is sufficiently set forth above in Point II and need not be repeated. We, of course, disagree that the conclusion of the Government, namely, that since the method devised by the court is no good that *ergo* divestiture is the only remedy open to a court of equity.

> "It is not our contention that each major defendant has a national monopoly of distribution, or that its film product alone would give its theatres a national monopoly of exhibition. We contend that each vertical affiliation between a major distributor and its theatres necessarily results in a continuing restraint and a monopolization with respect to that important segment of trade represented by the pictures it distributes to its own theatres".

and (Br. 91-2):

> "Each vertical relationship thus has two serious trade-restraining consequences. First, to the extent that the motion picture requirements of each group of affiliated theatres are satisfied by the pictures of its distributor, all other distributors are excluded from that important segment of the market. Second, wherever a distributor has theatres, the other exhibitors are excluded from the opportunity of licensing the exclusive runs reserved for the distributor's own theatres."

The Government's argument appears to be that integration is unlawful because, for example, Paramount pictures preempt some of the playing time in Paramount's theatres, but for which fact competing distributors' pictures might be shown at that very time in the Paramount theatre, and competing theatres might be showing those Paramount pictures at that time. It is claimed that this is an illegal restraint of trade requiring dismemberment as a matter of law.

The record shows that Paramount's theatres do not show Paramount pictures exclusively, and, in fact, that only a few of them could not exist on them alone. Pictures of other distributors must be and are regularly shown by

Paramount's theatres. There was no evidence that because and while Paramount pictures were shown in Paramount's theatres, competing distributors did not have an adequate theatre market outside of Paramount's theatres, or that theatres competing with Paramount's theatres had not sufficient other product to show at that time or were forced to shut their doors or even limit their programs.

The practice of showing Paramount pictures in Paramount's theatres is hardly exclusionary in any legal sense, and it certainly serves as no basis for holding that it involves an unreasonable or substantial restraint of trade. The findings show that Paramount pictures are shown in 8,000 to 14,500 of the 18,000 theatres in the United States (Finding 130, R. 3686) and that intense sales efforts are made to license as many theatres as possible (*supra*, pp. 13-14). This wide distribution of Paramount features is the antithesis of exclusion. The simple fact is that two pictures can not be shown at the same time on one screen in one theatre and whatever consequences arise from that fact will arise whether or not the theatre is owned by a distributor. It involves no more than the common experience that while any property is being enjoyed, there is ordinarily no room for duplication. But the consequences of that elementary fact can hardly offend the Sherman Act while it remains lawful to own and enjoy private property.

The Government relies for the novel proposition now advanced chiefly on the recent decision in *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). It, of course, does not say explicitly that integration *per se* is unlawful, and no such conclusion would find support in the *Yellow Cab* decision, but its argument, amounts to that, as we shall presently demonstrate.

The *Yellow Cab* case tested the sufficiency of a complaint which alleged in paragraph 20 (*Yellow Cab* Record, p. 8) that defendant Markin and others had commenced negotiations to merge certain cab operating companies. According to the complaint: "One of the principal purposes of the proposed merger was to insure that these cab operating companies would thereafter purchase all of their motor vehicles for use as cabs from CCM and would not buy them from competitors of CCM." The brief of the Government relied heavily on this allegation as to the purpose of the merger (Govt. *Yellow Cab* brief, pp. 6, 28), stating that the elimination of competitors from the market there in question "was not only effected by combination but was the direct object of the combination. Defendants obtained their 'dominating power' over the cab companies 'by deliberate, calculated purchase for control.' See *United States* v. *Reading Co.*, 253 U. S. 26, 57."

In reversing, this Court adopted this argument of the Government and emphasized the fact that: "The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint, to borrow language from *United States* v. *Reading Co.*, 253 U. S. 26, 57, is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.'"

One may well ask what findings there are in this record which can be considered comparable to the allegations in the *Yellow Cab* complaint. The Government suggests (Br. 90), that it is somewhat surprised by the absence of any "explicit" findings on this subject in view of the

claim—asserted without record references—that it has "consistently maintained" the position which is now developed in its Point II A. Without further controversy on that score it suffices to note that the findings of the court are complete and are directly contrary to the facts alleged and assumed to be true in the *Yellow Cab* case.

The court found on uncontroverted evidence that in 1916 or 1917, a group of exhibitors which controlled many of the then best theatres throughout the country organized First National Exhibitors Circuit, Inc. as a film buying combine. Shortly thereafter, First National, then in control of 3500 or more theatres, including the largest and best ones in the principal cities, entered the production and distribution fields, and embarked on a two-pronged campaign to entice away Paramount's acting and directing talent, and to bar its theatres to Paramount's productions (Findings 4-7, R. 3661-62). "In these circumstances Paramount determined to acquire interests in theatres of its own so that it might assure itself of outlets for Paramount productions" (Finding 8, R. 3662). The purpose thus was to compete and not, as the Government says, to acquire market control which would assure it of outlets regardless of the merits of its pictures.

These findings are, of course, a far cry from the charge in the *Yellow Cab* case, and rather exemplify what this Court meant when it suggested in the *Reading* case and reaffirmed in the *Yellow Cab* case that integration "obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management," would not violate the Sherman Act.

Paramount's integration, far from constituting "deliberate, calculated purchase for control", of exhibition, was in fact dictated by the growth of its enterprising production and distribution business which had found itself

deprived of an outlet for its product. It was confronted with the Hobson's choice of either (1) continuing to produce without a substantial number of customers to whom to sell; or (2) permitting its business to continue to grow by purchasing theatres where it might place its pictures in competition with those of other producers. (See Complaint par. 99, R. 3167).

The Government says that Paramount was guilty of "unlawful conduct" when it chose the latter course and yet it characterizes First National's exclusionary policies as "honest competition" (Br. 104). We know of no authoritative interpretation of the Sherman Act which sanctions a deliberate campaign—such as First National's—to deprive a competitor of its raw materials, its personnel, and to exclude it from the market; and yet makes it unlawful for that competitor to acquire its own outlets in order to survive. But however First National's tactics be described, unless the Court is prepared to hold that integration is unlawful *per se*, the conclusion below must be affirmed.

The "necessary consequence" (Br. 91) or the "natural consequence" (Br. 95) or the "necessary effect" (Br. 103) which the Government seems to find simply from the fact of the integrations now before the Court are common to all integrations in the sense that subsidiary corporations tend to purchase the product of their parents. But even if that natural tendency raised questions—which it does not, the defendants here could still not be found guilty of having monopolized any appreciable segment of the market.

Except for a very limited number of theatres in the very largest cities, no theatre can be operated on the product of only one distributor (Finding 151, R. 3689). Paramount, during the typical 1943-1944 season produced 31 features (Finding 99, R. 3677) and it is evident on the face of it that Paramount therefore could not fully supply even a theatre

which changed features only once a week and played on only a single-feature policy. Necessarily the great bulk of the nation's theatres in general, including Paramount's theatres, are in the market for the many additional features necessary to keep operating. They have not been withdrawn from the market as were the subsidiaries in the *Yellow Cab* case. By the same token, Paramount, by licensing or showing its features for exhibition in its own theatres did not take them out of the market as were the cabs manufactured by CCM. In order to stay in business and to operate profitably, Paramount must license its features to many others and as the court below said (R. 3554):

> "Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, *there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures.*" (Emphasis supplied.)

These considerations, which show the sharp distinction which must be drawn between the *Yellow Cab* case and the case at bar, *a fortiori* effectively destroy the basis for finding any analogy in *United States* v. *Lehigh Valley R. Co.* and *United States* v. *Reading Co.* on which the Government also relies. At the outset of the opinion in the *Reading* case, the Court emphasized the necessity for determining the intent and purpose with which the combinations assailed had been formed (253 U. S. 43-44). It then reviewed the annual reports of the Reading Railroad Company which showed that it had embarked on a policy of attempting to control the anthracite tonnage of the Schuylkill anthracite field by acquiring extensive ownership of coal lands. Such acqui-

sitions were followed by the purchase of competing railroads and by the utilization of the Holding Company to take control of a vast network of properties *"solely* because the creditors and stockholders of the former Reading Railroad Company and of the Reading Coal Company desired to establish the proposed scheme for control of the properties formerly owned by the two companies" (*id.*, at p. 47, emphasis supplied). Considerations like these led the Court to characterize the process by which the integration was accomplished as "deliberate, calculated purchase for control" (*id.*, at p. 57).

In both the *Reading* and *Lehigh Valley* cases, the chief object of the effort at control was a large area of coal-producing land, control of which by its very nature led to monopoly, in the light of the fact that the known coal-producing lands in the United States were extremely limited in area. On the other hand, there is no natural limit to the number of feature motion pictures which can be produced; and certainly "control" of less than 10% of them is not comparable to the control which was achieved in those two railroad cases.*

It is thus clear that the attempt to find an analogy in the *Yellow Cab, Lehigh Valley* and *Reading* cases must fail for two major reasons: (1) There is here no proof or finding that the integration of the theatre-owning defendants was the result of "deliberate, calculated purchase for control" within the meaning of those words as used in the cited cases; the proof and findings are to the contrary and

*The *Lehigh Valley* case, like the *Reading* case, involved an avowed plan to monopolize a large share of the anthracite-producing territory of the United States and revealed a 25-year history which "cast an illuminating light upon the intent and purpose with which the combination * * * was formed and continued" (254 U. S. at 269).

that failure of proof cannot be supplied by the surprising statement by the party with the burden of proof, that: "The court made no inquiry into the precise circumstances under which any particular interest was acquired * * *" (Br. 116). And (2) the relationship between these defendants and their subsidiaries does not lead to control of a "appreciable segment" of interstate commerce in motion pictures.

As we have pointed out *supra*, pp. 33-34, *United States* v. *Winslow*, 227 U. S. 202 (1913) and *United States* v. *United States Steel Corp.*, 251 U. S. 417 (1920) are still unquestioned authority for the proposition that there is nothing *per se* illegal in vertical integration of the manufacturing and selling functions of an industry.

The Government has not distinguished those cases here, as it tried to do at page 38 of its *Yellow Cab* brief, simply by calling them "merger cases." Instead it here cites *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 376-377 (1933) for the statement that "restraints which are unlawful when accompanied by a horizontal conspiracy must be equally unlawful when they follow as a natural consequence of a vertically integrated combination" (Br. 95). But the specious nature of this argument springs from the fact that what the Government is really urging is that unlawful restraints *always* follow from the mere existence, without more, of a vertically integrated business. The *Appalachian* case, of course, supports the directly opposite conclusion. It was there said (at p. 377):

> "The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the foundation of a huge corporation bringing

various independent units into one ownership. *Either may be prompted by business exigencies,* and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. * * * As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint." (Emphasis supplied).

The "natural consequence" or "necessary effect" argument was rejected specifically and explicitly in the *Steel* case* and inferentially in the *Winslow* case when this Court noted (227 U. S. at 217) that: "On the face of it the combination was simply an effort after greater efficiency." Our discussion *supra* (pp. 54-55) of *United States* v. *Aluminum Co. of America,* 148 F. (2d) 416 (Special Statutory Court, 1945) shows that that decision is to the same effect. And

*251 U. S. at 450; "The Government, therefore, is reduced to the assertion that the size of the Corporation, the power it may have, not the exertion of the power, is an abhorrence to the law, or as the Government says, "the combination embodied in the Corporation unduly restrains competition by its *necessary effect,* [the italics are the emphasis of the Government] and therefore is unlawful regardless of purpose." "A wrongful purpose," the Government adds, is "matter of aggravation." The illegality is statical, purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be led? Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention, which regards power rather than its use the determining consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the Government's contention that competition must not only be free, but that it must not be pressed to the ascendancy of a competitor, for in ascendancy there is the menace of monopoly."

there is nothing in the Government's brief which shows any reason, or indeed any desire, that those cases should now be overruled.

Certainly, nothing in *United States* v. *Swift & Co.*, 286 U. S. 106 (1932) which the Government cites and so elaborately discusses (Br. 109-13), suggests a basis for such a conclusion. The basic distinction between that case and this is, of course, the very one that the Government so lightly brushes aside (Br. 109), i.e., that the *Swift* case involved a consent decree. That decree was based on a complaint "that by concert of action the defendants had succeeded in suppressing competition both in the purchase of live stock and in the sale of dressed meats, and were even spreading their monopoly in other fields of trade. They had attained this evil eminence through agreements apportioning the percentages of live stock to which the members of the combinations were severally entitled; through the acquisition and control of stockyards and stockyard terminal railroads; through the purchase of trade papers and journals whereby cattle raisers were deprived of accurate and unbiased reports of the demand for live stock; and through other devices directed to unified control" (286 U. S. at 110). They had already "set about controlling the supply" of many other foods (ibid).

This Court expressly refused "to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they [the defendants] chose to consent, and the injunction, right or wrong, became the judgment of the court" (id., at 116-117).

The question before this Court was not whether these allegations of the complaint had been proved, but whether the Court "should leave the defendants where we find them,

especially since the place where we find them is the one where they agreed to be" (id., at 119). It was held that defendants had failed to make "a clear showing of grievous wrong evoked by new and unforeseen conditions" and that therefore the consent decree could not be changed (ibid).*

In short, in the *Swift* case, the burden of proof was on the defendants and they failed to sustain it. Here, the burden of proof was on the Government and nothing has been proved which was comparable to the facts alleged there.

The difficulty in the Government's position becomes apparent when it is finally compelled to concede (Br. 103), that:

> "Any manufacturer has the right to use his own product in his own outlets, so long as he does not use the advantage resulting from integration to restrain unreasonably the competition of others or to monopolize."

If the Court is to assume that this is a correct statement of the law, it will then wish to examine the findings below to determine whether there is to be found in them any warrant for the conclusion that Paramount or any other defendant used "the advantage resulting from integration to restrain unreasonably the competition of others or to monopolize." The findings of course are directly to the contrary. The court did find violations in license agree-

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*Contrary to what the Government says (Br. 110), the defendants failed to prove their main thesis, i.e, that A & P and others of defendants' competitors had become vertically integrated and therefore fully able to compete (286 U. S. at 118). In the case at bar, each of the integrated companies actually does compete with every other in every branch of the industry.

ments which included stipulations as to minimum prices and in other practices which it thought ran afoul of the Sherman Act. But these violations did not spring from the fact of integration and the court's finding is specific in this respect:

> "154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producers-exhibitors, but in admission price-fixing, [etc.] * * *. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which defendants' pictures have been exhibited" (R. 3690).

The opinion stated that "there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures" (R. 3554).

We do not understand the Government to contend that these findings are erroneous, and the recent decision in *United States* v. *National Lead Co.*, 332 U. S. 319 (1947) is a definitive holding that they preclude divestiture here. It was there said (at pp. 352-353):

> "The findings of fact have shown vigorous and effective competition between National Lead and du Pont in this field. The general manager of the pigments department of du Pont characterized the competition with Zirconium and Virginia Chemical as 'tough' and that with National Lead as 'plenty tough.' Such competition suggests that the District Court would do well to remove unlawful handi-

caps from it but demonstrates no sufficient basis for weakening its force by divesting each of the two largest competitors of one of its principal plants. It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion."

The Government concedes the axiom that "under the Copyright Act the copyright owner has the right to exhibit its own pictures and to prevent their exhibition by others" (Br. 97). Since, as we have demonstrated, the defendants have the right to own theatres, it must follow that they—both as copyright owners and under general law—have the right to exhibit pictures in their own theatres. The Government contrives an elaborate argument upon the premises that the defendants are here claiming some additional "special privilege" arising out of copyright ownership and that the trial court "assumed that such a privilege was granted by the Copyright Act" (Br. 98).

Nothing in this record supports the conclusion that the court labored under any such impression. From a reading of the court's opinion (R. 3528-29), the contrary would seem to be the fact. Nor have the defendants ever made any such claim. Our position is simply that the defendants have the right to own theatres and to exercise their rights as copyright owners by exhibiting pictures in them.

Section IV of the decree (R. 3700), with which the Government takes issue, grants no special privilege and there is no warrant for suggesting that it is founded solely

on the Copyright Law.* The court concluded, entirely correctly as we have demonstrated, that the defendants had the right to own theatres. That conclusion was based upon the absence of any proof which could properly justify divestiture or any other deprivation of defendants' right to treat their own theatres as their own, although that right continues to be subject to the anti-trust laws. The court therefore directed that "Nothing contained in this Decree shall be construed to limit" that right. Such a provision was entirely proper and necessary and does not deprive the rest of the decree of any of its force or effect.**

**The Government's Contention that the Court in Any Event Should Have Compelled Defendants to Sell Their Partial Interests in Theatres.**

At pages 115 *et seq.* of its brief, the Government emphasizes the unreasonableness of its whole position, when it argues that the trial court should have ordered compulsory sale of defendants' partial interests and not have left it open for them to apply for permission to buy out the other interests upon a proper showing to the court that competition would not thereby be unreasonably restrained.

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*Section IV of the present decree was derived from Section XVII of the Consent Decree (R. 3392-93). The Government originally assigned error to its inclusion in the decree (Assignment 9, R. 3722) but that assignment is not included in the Government's specification of the errors to be urged (Br. 46).

**The suggestion that the decree in *Interstate Circuit* v. *U. S.*, 306 U. S. 208 (1939) will somehow be diluted by Section IV (Br. 98) deserves no additional comment. Section IV limits only "this Decree" and approves nothing which was disapproved in the *Interstate* case. The defendants must still obey the law of the land, whether that law is to be found in statutes or in decrees of courts of competent jurisdiction.

Using a finding of the lower court which has to do only with "pools" of competing theatres as a fulcrum, the Government attempts to excuse its failure to prove the illegality of partial ownerships, and tries to assimilate them all to pools of competing theatres (Br. 115-116); thus falling into the same error as did the trial court elsewhere.

The fact is, as we have stressed in Point I, *supra*, that the Government offered no proof of the origin and effect of partial interests in theatres and, therefore, the court "made no inquiry" with respect thereto. The Government apparently thought such proof immaterial but, as we have shown, if it had presented it the court below might properly have reached the conclusion that many, if not all, of the situations involved no restraint of competition. The error which we claim the court made, as shown in Point I, is that it erred in its assumptions that *all* of these situations were unlawful, and in its failure to provide any opportunity to have the facts as to their purpose and effect examined.

The extent to which (if at all) the joint interests of any defendant were held with an actual or putative competitor was never shown by the Government, and even if it be assumed that all Paramount's partial ownerships were with actual or putative competitors, Paramount's total partial ownerships—816 out of 18,076 theatres—about 4½% (Finding 117, R. 3683-4) of the country's total—can hardly be said to be so significant as to be a consequence of extraordinary control of feature pictures, especially when it is remembered that Paramount's features amount to only about 9% of those released by all distributors annually. Since, under the decree, all purchases by a defendant of the outstanding interests are subject to the control of

the court and are dependent upon a proper showing, there can be no fear that more serious consequences will result in a purchase than a sale.

As the Government argued in the *Crescent* case, the test of legality of an acquisition should be its effect upon competition (R. 2553), and this is the test which this Court approved in that case and the statutory court here has followed in requiring applications in connection with proposed purchasers of the balance of partial interests.

The Government urges that retention of control by the court over acquisitions of the outstanding stock in these partial ownerships does not cure the decree's deficiency because, it says, "If joint operation or ownership is illegal *per se*, as the trial court found, that illegality can, under no circumstances, be terminated by a defendant's acquisition of its partner's interest. * * *" (Br. 118). But, as we have shown, the error of the court was in considering all partial ownerships unlawful *per se*, without proof of their origin, purpose or effect. There is no justification for the Government's statement (Br. 119) that "* * * any proposal to buy or sell at a fixed price would result in the purchase by the defendants instead of by the non-defendant", since the district court under the decree would have to inquire as to whether a proposed purchase would unduly restrain competition in the area where it would occur.

As far as deadlocks are concerned—the supposititious situations where neither the defendant nor the independent desires to sell (Br. 119)—a proposal made by the defendants in their suggested decree that they be permitted to divide assets in such an event (R. 3618-9), was designed to, and would, obviate this supposed impasse. The remedy in such situations should be left to the lower court, if any

part of the decree relating to partial interests is allowed to stand. Certainly it would be a strange result to deny all discretion to it because some of the problems may involve ingenuity in its exercise.

At pages 123-126 of the brief the Government somewhat belatedly makes an extremely tenuous argument that complete divestiture should have been granted on the theory that an integrated manufacturer of films could deprive the public of its constitutional right to freedom of thought, expression and opinion. The production and distribution fields, being open to all, as the Government conceded (R. 1949) and as the court found (R. 3554, 3559), this argument has no relevancy to Judge Hand's remark in the *Associated Press* case quoted at page 125 of the brief or to any other issue here. And Mr. Justice Frankfurter's remarks in the same case clearly apply to a situation not found in the present record. Where, as in this industry, anyone can produce any picture and procure distribution for it, and where there is no proof that any defendant's theatre refused to play any particular picture, the supposed restraints on freedom of expression are chimerical.

**The Government's Contention That the Court Should Prohibit a Theatre Owning Defendant From Licensing Its Pictures For Exhibition in the Theatres of Any Other Theatre Owning Defendant**

This relief is asked by the Government as interim relief pending divorcement and is based upon the assertion that there is unlawful "cross-licensing" between the integrated defendants. In the trial court the Government explained

what it meant by cross-licensing as follows (Gov't Trial Brief, 21):

> "By cross-licensing we do not mean the execution of a single agreement by two distributor members of these combinations with two or more exhibitor members. *What happens is that Loew, for example, as a distributor, licenses its films to Paramount, as an exhibitor, by agreements which are generally separately executed by nominally different corporate entities than those involved in the license agreements made by Paramount as a distributor with the theatres controlled by Loew.* However, the competitive effect of these arrangements is the same as though all parties involved had made a single agreement, in view of the unified control of the distributing and theatre operating members of each combination." (Emphasis supplied).

The fallacy of this claim arises from the fact that there is no proof in the record of any interchange of mutual benefits or of any conditioning of one license agreement upon the granting of another. The evidence is all directly to the contrary (R. 436, 535, 539, 543, 685, 687, 1110, 1041, 1659, 1843, 1852).

A true case of "cross-licensing" is that exemplified by *Standard Oil Co.* v. *United States*, 283 U. S. 163 (1931), as an interchange of rights. *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386 is also an example of true cross-licensing. No such practices were established here.

Furthermore, in its trial brief the Government likewise admitted that negotiations between a Paramount theatre, for example, and Loew as a distributor were not conditioned upon similar negotiations by Loew as an exhibitor and

Paramount as a distributor (Gov't Trial Brief, 20). The evidence showed that in cities where one defendant had no theatre of its own and was thus required to make a choice of customers, it chose its first-run account on the basis of the ability of the theatre to pay the highest revenue among all the theatres in the city which were willing and able to "buy". In some of those cities some defendants selected theatres belonging to another defendant, and in others they selected independents as their first-run accounts. There is no discernible pattern for the selections made by any two defendants in those cities of their first-run accounts. This absence of pattern is fatal to the entire conception.

The argument for the interim relief is quite frankly for relief which does not provide divestiture in terms but does so in effect. The trial court having rejected its prayer for divorcement, the Government then devised this method of accomplishing the same result in many cases, immediately and by instant strangulation, without even a vestige of hope of salvaging even their fair value. There is no precedent whatever under the Sherman Act for outright confiscation.* Of course, if dismemberment had been decreed and competition in the exhibition business by the defendants had been banned, the question of this relief would be academic. And, since that relief is tantamount to divestiture at least of some theatres, as the Government acknowledges, it is equally academic in the absence of a basis for that drastic relief. The prohibition asked is not, as the Government would have this Court believe, simply "directed at the very agreements by which the defendants

*Even in the *Hartford-Empire* cases, the receivership (which this Court later held to have been an abuse of discretion) was a device to conserve, not destroy, property values.

effectuated their conspiracy" (Br. 127), because any objectionable terms of the agreements, can be, and are, banned by the decree. The relief asked is directed toward enforced sale of theatres, as counsel for the Government stated in court (R. 2574-5, 3001, 3007) and admit in the brief (Br. 131).

In short, the Government's conclusion that this Court should reverse, as an abuse of discretion, the decree of the court below, and direct a decree of divorcement with immediate consequences designed to kill,—not cure, should be rejected *in toto*.

## Conclusion

The decree below should be reversed to the extent set forth in our specification of errors and argument as appellants, and otherwise affirmed.

Dated, January 30, 1948.

Respectfully submitted,

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## APPENDIX A

### Pertinent Portions of the Sherman Act.

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court, 26 Stat. 209 (1890), as amended 50 Stat. 693 (1937); 15 U. S. C. §§ 1, 2 (1940).

### Pertinent Portions of the Copyright Act.

"SECTION 1. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic

work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) * * *.

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; * * *" (35 Stat. 1088).

## APPENDIX B

### Provisions of Decree Proposed by Defendants in Lieu of Section II (8) and (9).

7 (a) From arbitrarily refusing the request* of an exhibitor that the distributor defendant license a feature to him for exhibition in his theatre on any run licensed by the distributor instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. A distributor defendant shall not be deemed to have arbitrarily refused any such request if it has granted the license for the feature for such run theatre by theatre; feature by feature; solely upon the merits, and without discrimination as between the competing theatres, whether in favor of a theatre in which any other defendant has an interest; of a circuit theatre; of an old customer, or of any person whatsoever. In determining which of two competing exhibitors is entitled on the merits to the license for a particular feature for his theatre, the distributor defendant shall take into consideration the following factors, among others, and accord to them the importance and weight to which each is entitled regardless of the order in which they are listed.

(1) The film revenue which the distributor defendant will derive from each theatre for the exhibition of such feature on the run in question, and upon the terms offered by the exhibitor. In estimating such film revenue, the distributor defendant should take into consideration, among other things:

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*For the purposes of this subdivision a request by an exhibitor must be made in writing to the distributor defendant at its home office, by registered mail and such demand shall be deemed to have been refused by the distributor defendant either upon the receipt by the exhibitor of the distributor defendant's refusal in writing, or upon the expiration of days after such mailing of the exhibitor's request.

The number of days for which and the particular days of the week or year or other playing arrangements upon which each exhibitor plans to play the feature; the character, location and size of each theatre; the type of entertainment which each exhibitor intends to present with the feature involved and which the exhibitor in the past has customarily offered the public; the appointments and equipment of each theatre; transit facilities; the admission prices of each theatre as set by each exhibitor for the period of the exhibition of the feature; the distributor defendant's actual experience with each of the exhibitors in fulfilling its obligations in past contracts; each exhibitor's reputation generally in the industry and in the community for honesty, fair dealing and showmanship; and the financial responsibility of the exhibitor operating each of the theatres involved;

(2) The comparative suitability of the theatres for the advantageous exhibition of the distributor defendant's feature on the run in question; and

(3) The effect which the exhibition of the feature in each of the theatres would have upon other exhibitions of the feature.

7 (b) From refusing to license its features for exhibition in an exhibitor's theatre on some run (to be designated by the distributor) upon terms and conditions fixed by the distributor defendant which are not calculated to defeat the purposes of this subdivision 7 (b), if the exhibitor can satisfy reasonable minimum standards of theatre operation and .. reputable and responsible, unless the granting of a run on any terms to such exhibitor for said theatre will have the effect of reducing the defendant distributor's total film revenue in the competitive area in which such exhibitor's theatre is located.

## C. Arbitration Under Section II 7 (a)

Controversies arising upon the complaint of an exhibitor that a distributor defendant has failed to comply with the provisions of Subdivision 7 (a) of Section II of this Decree shall be subject to arbitration in the manner provided in the Rules of Arbitration.

If the arbitrator finds in favor of the distributor defendant, he shall dismiss the complaint.

If the arbitrator finds that the distributor defendant has arbitrarily refused to license the feature or features to the complainant on the run requested, and has instead licensed it or them to a competitor of the complainant on such run, he shall make an award against the distributor defendant, which award shall not affect any license to exhibit any features then under license to the complainant's competitor, but shall direct the distributor defendant thereafter in good faith to afford the complainant as well as such competitor the opportunity to negotiate for such run of any features thereafter released by the distributor defendant, for exhibition on such run, for which they desire to negotiate, and the arbitrator may in addition, in his discretion, direct the distributor defendant to pay to the complainant his actual pecuniary loss resulting from the distributor defendant's failure to comply with subdivision 7 (a) of this Section II, which damages shall be in the sum of not less than $100 nor more than $5,000.

After a final award in favor of a complaining exhibitor has been made under this section, such exhibitor may institute a further arbitration proceeding (to be held before the arbitrator who made the original award, if available) upon the ground that such award has not been complied with in good faith by the distributor defendant against which it was entered, and in any such proceeding, if the arbitrator shall find that the distributor defendant has not complied in good faith with the original award, he may award further damages to the complaining exhibitor for his actual pecuniary loss resulting from the defendant distributor's failure

to comply with the original award, which damages shall not be less than $100 nor more than $5,000.

An exhibitor shall have no right to assert such claim unless the arbitration shall be commenced within thirty (30) days after the refusal constituting the claimed non-compliance with Subdivision 7 (a) of this Section II.

D. Arbitration Under Section II 7 (b)

Controversies arising upon the complaint of an exhibitor that a distributor defendant has not complied with the provisions of subdivision 7 (b) of this Section II, shall be subject to arbitration in the manner provided in the Rules of Arbitration.

If the Arbitrator finds in favor of the distributor defendant, he shall enter an award dismissing the complaint.

If the Arbitrator finds in favor of the complainant, he shall make an award directing the distributor defendant thereafter in good faith to offer its features for license to the complainant for exhibition in said theatre on a run to be designated by the distributor and upon terms and conditions fixed by the distributor defendant which are not calculated to defeat the purposes of said subdivision 7 (b) of this Section II. The burden of showing that granting a run on any terms to the complainant will have the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located shall be upon the distributor.

Any distributor defendant affected by such an award may institute a further arbitration proceeding to be relieved therefrom on the ground that since the making of the award the granting of a run in compliance therewith has had the effect of reducing the distributor defendant's total film revenue in the competitive area in which the complainant's theatre is located, and, in the event that the Arbitrator finds that the granting of a run in compliance with the award has had the effect of reducing the distributor defendant's total film revenue in said area, he shall vacate the award.

## E. Election of Remedies

Any exhibitor shall be free to avail himself of the right (1) to file a complaint under the arbitration provisions of this subdivision 9 of this Section II of this Decree or (2) to pursue remedies at law or in equity, but his election of one remedy or the other as a particular controversy shall be final.

10. Nothing contained in this Decree, affording to exhibitors the right to proceed by Arbitration, as in this Decree provided, shall impair or affect the right of the plaintiff to take any proceedings which it otherwise could to enforce the provisions of this Decree or to punish wilful violation.